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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XXXVI

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FOURTH DISTRICT
IN JUNE, AUGUST AND OCTOBER, 1890; IN THE SECOND DISTRICT IN
MAY AND JULY, 1889, AND MAY AND JUNE, 1890, AND
IN THE THIRD DISTRICT IN MAY, 1890.

REPORTED BY

EDWIN BURRITT SMITH

OF THE CHICAGO BAR

CHICAGO

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OFFICERS OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

FIRST DISTRICT.

JOSEPH E. GARY, <i>Presiding Judge</i> ,	- - - - -	Chicago.
GWYNN GARNETT, <i>Judge</i> ,	- - - - -	Chicago.
THOMAS A. MORAN, <i>Judge</i> ,	- - - - -	Chicago.
JOHN J. HEALY, <i>Clerk</i> ,	- - - - -	Chicago.

SECOND DISTRICT.

CLARK W. UPTON, <i>Presiding Judge</i> ,	- - - - -	Waukegan.
LYMAN LACEY, <i>Judge</i> ,	- - - - -	Havana.
C. B. SMITH, <i>Judge</i> ,	- - - - -	Champaign.
JAMES B. COMBS, <i>Clerk</i> ,	- - - - -	Ottawa.

THIRD DISTRICT.

GEORGE W. PLEASANTS, <i>Presiding Judge</i> ,	- - - - -	Rock Island.
GEORGE W. WALL, <i>Judge</i> ,	- - - - -	Du Quoin.
CHAUNCEY S. CONGER, <i>Judge</i> ,	- - - - -	Carmi.
GEORGE W. JONES, <i>Clerk</i> ,	- - - - -	Springfield.

FOURTH DISTRICT.

OWEN T. REEVES, <i>Presiding Judge</i> ,	- - - - -	Bloomington.
N. W. GREEN, <i>Judge</i> ,	- - - - -	Pekin.
J. J. PHILLIPS, <i>Judge</i> ,	- - - - -	Hillsboro.
JOHN W. BURTON, <i>Clerk</i> ,	- - - - -	Mt. Vernon.

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CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1890.

WARREN MAY
V.
CAROLINE LEIGHTY ET AL.

Administration—Claims Due from Administrator—Practice.

1. An administrator, who has included in his inventory notes due from himself which he claims he is not liable to pay, can not give himself credit therefor and have his liability tried by the Probate Court on exceptions to his report.

2. The proper mode of procedure is for the court to appoint an administrator *pro tem.* to bring suit on the notes and prosecute it to final judgment.

[Opinion filed June 13, 1890.]

IN ERROR to the Circuit Court of Richland County; the
Hon. WM. C. JONES, Judge, presiding.

Messrs. WILSON & HUTCHINSON, for plaintiff in error.

Messrs. HUFFMAN & HUFFMAN and GEE & BARNES, for
defendants in error.

REEVES, P. J. Jacob May died intestate. Appellant was
appointed administrator of his estate. In the inventory he
listed certain notes made by Harrison May, William May and

36	17
52	546
36	17
197	4
36	17
112	591

appellant, amounting in the aggregate to a large sum. In connection with these notes as listed in the inventory, there is this statement made by the administrator: "These notes the payors insist they are not liable for as the same were not to be paid unless demanded by payee in his lifetime." It is not claimed that this or anything of like import appears on the notes or in any way attached to them. On October 4, 1889, the administrator filed a report, in which he asked to be credited with the notes given by him to his father, being four notes dated September 1, 1885, each for the sum of \$1,996.10 with a credit of \$202.24. The record of the County Court shows that "the administrator and all the heirs of Jacob May appearing, and exceptions having been filed to the administrator's report, denying his right to be credited with the amount of his four notes, a special administrator is appointed to take charge of said estate and protect its interests so far as this report is concerned, with authority to litigate, till finally settled, all questions arising under said report and exceptions thereto. Adolph Knoph was appointed special administrator for that purpose. He accepts the trust and appears by J. C. Allen, attorney. Cause heard and the four notes found not to be payable, and judgment that Warren May, as administrator, have credit by the amount of these notes, and that Warren May, individually, be exonerated and discharged from their payment." An appeal was prayed by defendants in error, two of the heirs of Jacob May, and allowed to the Circuit Court.

When the case came up for hearing in the Circuit Court, the cause was submitted to a jury, upon what issues does not appear, except as shown by the evidence, and the jury returned this verdict: "We, the jury, find that the defendant, Warren May, is not entitled to the credit asked for by him against the estate of Jacob May, deceased, and that he should pay to the administrator of the estate of Jacob May, deceased, the four notes dated September 1, 1885, each for \$1,996.10, and that we find the amount due upon said notes to be \$9,707.51." A motion for a new trial was overruled, and this judgment entered: "It is, therefore, considered by the court that the

May v. Leighty.

said Warren May is indebted to the estate of the said Jacob May, deceased, the sum of \$9,707.51; that the exceptions to the report of the administrator of the estate of Jacob May, deceased, filed by Caroline Leighty and Jane Atwood be and the same are sustained, and said report disapproved in so far as the administrator asks credit for the notes of Warren May; that the administrator of said estate recover of and from said Warren May the said sum of \$9,707.51 and costs of suit, and that this cause be certified back to the County Court." From this judgment, the case is brought here by writ of error. We fail utterly to understand upon what warrant this proceeding as it appears from this record, was entered upon and conducted.

The administrator, *prima facie* at least, owed the estate four notes, which he had inventoried. When he made his report, he credited himself with these four notes, claiming he was not liable to pay them. The County Court, instead of disallowing the credit as it should have done, adopted the anomalous proceeding of entertaining an exception to the credit by some of the heirs and proceeded to try the question of the liability of appellant on these notes upon a hearing of such exception. In the accounting which an administrator is required to make it is specifically provided what may be the credits which he may enter in his accounts. They are, first, the expenses of probate and administration; second, the allowance to the widow or minor children as fixed by statute or order of court, referring to the order of court if any there be; third, the loss, if any, arising out of the sale of the inventoried property below its appraisement; fourth, the loss, if any, arising in the collection or conversion into money, of accounts, notes, bonds, stocks or mortgages or other choses in action; fifth, the loss, if any, of uncollectible debts, compromises, duly authorized with debtor's diminution of debts due the estate by set-offs proved; sixth, debts proved and paid according to their priority, and, seventh, the compensation of the administrator. It will be seen that there is no place in such an account upon the credit side for debts due from the administrator, duly inventoried and charged to the administrator

upon the debit side of his account, which he may choose to say he ought not to pay. In the absence of statutory provision to the contrary by the common law in England the nomination by a testator of his debtor as executor operates as an extinguishment of the debt, because an executor can not maintain an action against himself, and the personal action once suspended by the voluntary act of the creditor, it is forever gone and discharged, except as against the creditors of the testator. But in equity, the debt is presumed to have been paid by the executor, and constitutes assets for the payment of the debts of the testator, and legacies or a trust for the next of kin, because in equity, that which the law requires to be done must be presumed, against the obligee to have been done. Williams on Executors, 1314. The appointment of a debtor administrator of his creditor's estate has a similar effect for the same reasons; but since the appointment of the administrator is not the voluntary act of the creditor, the debt is not discharged, but an action therefor only suspended by such appointment; hence the debt may be collected by a subsequently appointed administrator.

In this country the equitable rule above stated is the rule at law also, and in the absence of statutory regulation, the debts of executors and administrators are *prima facie* assets in their hands to be accounted for as other assets. In this State, our statute expressly provides that the appointment of a debtor as executor shall not operate as a release of the debt unless the testator expressly declare his intention to release the debt, and then it is not operative unless the other assets of the estate are sufficient to pay the debts.

The fiction of the law by which the administrator's liability to the deceased is converted into ready cash, is not upheld in all the States. The question, so far as we know, has not been before our Supreme Court. We are inclined to hold that the administrator may show not only his insolvency, but may in an appropriate proceeding contest his liability on the ground that he does not owe the debt or that it is unjust. What is such appropriate proceeding? It has been held in Wisconsin that in such case the Probate Court should remove the administrator and appoint a competent administrator who

May v. Leighty.

should be required to bring suit against the late administrator. *Lynch v. Divan, Ex'r*, 66 Wis. 490.

We think in this State the better practice would be to proceed in analogy to the provision of our statute providing for the appointment of an administrator *pro tem.* when the administrator has a claim against the estate. Where a claim against the administrator has been inventoried, and he becomes *prima facie* chargeable with the amount of the demand, upon his petition, the County or Probate Court would be justified in appointing some competent person administrator *pro tem.*, with authority to bring suit against the administrator as an individual, and prosecute it to final judgment. We can see no good reason why this might not be done. In such a suit an issue could be formed in the mode prescribed by law. There would be legal parties on both sides of the controversy, who could control the litigation and appeal or prosecute a writ of error, and there would be no difficulty in framing a proper judgment in such a case. The proceeding that was had in this case did not admit of any written pleadings and formation of defined legal issues. The issue that was sought to be made was not the real issue tried. The only direct issue sought to be made was whether May, as administrator, was entitled to a credit for the amount of his notes, which was not a question to be submitted to a jury, while the real issue was his liability, as an individual, upon these notes to the estate, which was an issue triable by jury.

The judgment of the Circuit Court was much broader than the only issue which could be legally evolved out of the case as it was presented, would warrant.

The judgment of the Circuit Court is reversed, and the cause remanded to the Circuit Court with directions to reverse the action of the County Court and direct the County Court to disallow the credit claimed by the administrator and appoint an administrator *pro tem.* to bring suit against Warren May on the four notes and prosecute the same to final judgment.

The costs made by each party in this court, the Circuit Court and the County Court, will be paid by the party making the costs.
Reversed and remanded.

JOHN MCELHANON

V.

LOUIS MCFERRON.

Replevin—Ownership—Possession—Instructions.

In replevin, where the evidence of ownership is conflicting, an instruction that defendant's possession at and after the commencement of the action is *prima facie* evidence of his ownership, and that, being in possession, he is presumed to be the owner, is erroneous.

[Opinion filed June 13, 1890.]

APPEAL from the County Court of Washington County; the Hon. GEORGE VERNOR, Judge, presiding.

MESSRS. JAMES M. ROUNTREE and JAMES A. WATTS, for appellant.

MR. W. HENRY MOORE, for appellee.

GREEN, J. This suit in replevin was brought by appellant to recover from appellee certain grain and hogs, averred in first count of declaration to have been unlawfully taken, and, in second count, to have been unjustly detained by appellee. The jury found for the defendant. Plaintiff's motion for a new trial was overruled. The court rendered judgment against plaintiff for costs, and he took this appeal. The only material question in dispute is, who owned the property when plaintiff demanded the possession of it from defendant? Plaintiff contended he was then the owner, and defendant insisted he then owned it. Each party introduced much testimony in support of his claim of ownership. Upon that question there was a sharp conflict of evidence, and upon the facts as disclosed by the record the giving of defendant's second instruction was such error as requires us to reverse the judgment. Defendant was in the lawful possession of the

McElhanon v. McFerron.

property up to the time of demand, but if he was not then the owner of the property, and plaintiff was, it must be conceded the latter had the right to resume the possession of it, and it became the duty of defendant to comply with the demand for possession and deliver the property to plaintiff, and if he refused to do so he became guilty of the unlawful detention charged in the second count of the declaration.

Defendant's second instruction informed the jury, "that possession is *prima facie* evidence of ownership, and that defendant, being in possession of the property in dispute at the time of the commencement of this suit, is presumed to be the owner." This instruction was clearly wrong. It does not follow that because defendant was in possession of the property at the time suit was commenced, and after demand for and refusal to deliver possession to plaintiff, that such possession by defendant furnished, even *prima facie*, evidence of ownership in him, much less would it compel or require the jury to presume, as a matter of law, defendant was then the owner. The instruction was also vicious in this: by it the jury were in effect told not to consider the evidence showing the circumstances and conditions under which defendant acquired and held the possession of the property in dispute, and which evidence was material and pertinent in determining the question of ownership. All this evidence was withdrawn from the consideration of the jury, and if they followed the instruction they were compelled to find the defendant owned the goods at the commencement of the suit, because he was then in possession, and it mattered not whether that possession was rightful or wrongful. If they so found, then defendant could not be guilty of the wrongful detention, and plaintiff could not recover, but would be defeated by a finding not based upon or supported by the evidence and resulting from following the direction of an erroneous instruction. An instruction of similar character is condemned in *Bergen v. Riggs*, 34 Ill. 170. As this case must be tried by another jury, we refrain from further comment upon the facts. The judgment is reversed and cause remanded.

Reversed and remanded.

THE CITY OF MT. VERNON

v.

DANIEL LEE.

Municipal Corporations—Personal Injuries—Negligence—Defective Streets—Evidence—Bill of Exceptions.

1. On appeal on the ground that the verdict is contrary to the evidence, the bill of exceptions must contain all the evidence.

2. In an action against a city for personal injuries sustained by reason of a defective culvert on its streets, this court declines to interfere with a verdict for plaintiff.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Jefferson County; the Hon. C. C. BOGGS, Judge, presiding.

Messrs. POLLOCK & POLLOCK, for appellant.

Mr. W. H. GREEN, for appellee.

GREEN, J. This suit was brought by appellee to recover for injuries received by him while passing over and across a covered culvert in said city. A board in the culvert was unsecured and loose, and being so, when he stepped upon one end it flew up and he was struck and severely injured. The jury found defendant guilty of the negligence charged, assessed plaintiff's damages at \$80, and the court entered judgment for plaintiff for that sum, and costs. The city took this appeal.

We would be justified in declining to pass upon any of the questions presented for our consideration on behalf of appellant, because the bill of exceptions does not contain all the evidence introduced at the trial.

By the record it appears "Winslow's plat of his addition to the city of Mt. Vernon" was offered and admitted in evidence

and explanations of the plat were also given in evidence to the jury. No copy of the plat nor any of the explanations given are contained in the bill of exceptions, and this omitted evidence may have tended strongly to support the verdict. Waiving this objection, however, we find in the record evidence from which the jury might fairly conclude the culvert in question was under the care and control of the city, and was used by pedestrians as a crossing in approaching and getting upon a city sidewalk. That it was being so used by plaintiff at the time he was injured, and he was then in the exercise of reasonable care. That during a long period prior to and up to and at the time of injury, said culvert was permitted by defendant to remain in a defective and unsafe condition. That by the negligence of defendant the board in said culvert was permitted to be and remain loose and unsecured, and by reason thereof plaintiff was struck and injured without fault on his part. Concerning many of these material matters there was a sharp conflict of evidence which the jury settled, as it was their duty to do, by giving credit to such parts as they believed to be true, and rejecting such portions as they believed untrue. They saw the witnesses and heard them testify upon the direct and cross-examination and had means we are deprived of, to weigh, compare, and properly estimate the value of the evidence. There is nothing in the record to satisfy us the jury did not honestly perform their duty, or that the verdict was unjust and unwarranted by the evidence. In the conflicting state of the evidence, under long and well established rules of practice we decline to disturb their verdict. *First Nat. Bank v. Mansfield*, 48 Ill. 494; *Buchanan v. McLenan*, 105 Ill. 56. The foregoing remarks will apply to the plea of accord and satisfaction which the jury were justified in finding was not proven. Some of the instructions complained of were not strictly accurate, but when all the instructions given are considered together, it appears to us the jury were not misled or misdirected as to the law. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

MOLINE PLOW COMPANY

V.

GEORGE V. VANDERHOOF AND NANNIE VANDERHOOF.

Homestead—Abandonment—Evidence.

Where one, during his tenure of public office, leaves his homestead, together with his family, intending to return thereto, and goes to reside at another place, where he afterward votes, he does not thereby lose his right of homestead.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Jasper County; the Hon. WM. C. JONES, Judge, presiding.

Messrs. GIBSON & JOHNSON, for appellant.

Messrs. D. B. BROWN and E. CALLAHAN, for appellees.

REEVES, P. J. Appellant recovered two judgments against appellee, George V. Vanderhoof. Executions were issued on these judgments and levied on the southeast quarter of the southeast quarter of section five, town six north, of range nine east. This bill was filed in aid of said execution, the legal title to the land being vested in Nannie Vanderhoof, the wife of the defendant in the executions. The Vanderhoofs answered claiming the land levied on as their homestead. The conceded facts are that George V. Vanderhoof was the owner of a house and lot in Newton, which he and his wife occupied as a homestead until December, 1886, when he was appointed a guard at the penitentiary at Chester. Shortly after he rented out his home in Newton, and his wife went with him to Chester. He claims that his stay in Chester was temporary, dependent upon his retention of the place as guard, which had no fixed tenure, and that it always had been

Moline Plow Co. v. Vanderhoof.

his intention when this employment by the State ceased, to return to Newton. In April or May, 1887, Mrs. Vanderhoof, with the consent of her husband, exchanged the house and lot in Newton for the forty acres of land above described, and the deed to the land was made to Mrs. Vanderhoof.

It is also conceded that she paid no consideration for the deed, the only consideration being the conveyance of the house and lot in Newton, which was property of the husband. Vanderhoof says that his object in making the exchange of the house and lot for the land, was that when he lost or gave up his position at Chester, he would have a better place to make a living. He says the only reason for making the deed to his wife was that she desired it. Soon after the trade, the Vanderhoofs made some repair on the house, on the land, built some fence, planted fruit trees, etc., with a view of making the place their home. They rented the land to a tenant who agreed to give them possession of the house at any time when they wanted to occupy it. They also claim that they placed some of their personal property and effects on the farm and have always regarded the place as their home to which they expected to return whenever he gave up his employment at Chester. He says that they had made arrangements to move on the farm last September, but receiving notice of this suit they made other arrangements until the matter was settled. It is further conceded that the house and lot in Newton and the forty acres of land were each worth less than one thousand dollars. It was shown that Vanderhoof, at the election in November, 1888, voted at Chester. Under the facts, it must be conceded that had the Vanderhoofs retained their house and lot in Newton and rented it out during their temporary absence, with the intention always present of returning to their home in Newton whenever the employment of the husband by the State ceased, the homestead right would have been preserved under the statute. The land, in which the homestead was at once reinvested, is entitled to the same exemption as the original homestead. The evidence shows that after the exchange it was the continuing intention of the Vanderhoofs at the conclu-

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sion of their temporary stay in Chester to return to the farm and occupy it as their homestead, and that after the exchange they always regarded the farm as their home. They acquired no other homestead, and made no effort to do so. Under the facts we hold the homestead was not abandoned by appellees and the decree of the Circuit Court dismissing appellant's bill was right and is affirmed.

Judgment affirmed.

36	28
140	445
36	28
52	579

THE CITY OF CARLYLE

V.

THE CARLYLE WATER, LIGHT AND POWER COMPANY.

Municipal Corporations—Contract for Furnishing Water—Assignment of—Pleading—Res Adjudicata.

1. A judgment for costs against the assignor of a contract to furnish a city with water, brought after the assignment, is no bar to a subsequent suit on the contract by the assignee.

2. In the case at bar it is held that a contract by a city to pay a company, "or its successors and assigns," for furnishing water to the city, was legally assigned.

3. The statutory provisions touching the mode of assigning negotiable instruments are not applicable to the assignment of such a contract.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Clinton County; the Hon. BENJ. R. BURROUGHS, Judge, presiding.

Messrs. J. J. McGAFFIGAN and BELL & GREEN, for appellant.

Messrs. VAN HOOREBEKE & FORD and M. P. MURRAY, for appellee.

GREEN, J. This cause was before us at the August term, 1888; the judgment of the Circuit Court was then reversed and the cause remanded.

In the court below a jury was waived, the cause was tried

by the court. The issues were found for the plaintiff. Judgment on the finding was rendered against defendant for \$1,142.60 damages and costs of suit, to reverse which defendant took his appeal.

Inasmuch as most of the errors assigned upon this record were disposed of by the former decision, so far as this court could do so, we have but little to add in this opinion to what was said in the former opinion. Three points, however, are presented on behalf of appellant, claimed to be new and additional grounds for reversing this judgment, and not urged or considered heretofore, which we are invited to examine and pass upon.

First: It is insisted the Circuit Court erred in not permitting defendant to file a plea of former recovery tendered by it, and that denying such permission was an abuse of the discretionary power of the court, to the injury of defendant, that requires a reversal. The former recovery pleaded, was a judgment for costs against the Water, Light and Power Company of St. Louis, in a suit brought by it for the use of appellee against appellant, for the same causes of action sued for in the present case. But the record discloses the fact that long before and at the time the St. Louis company brought that suit, it had sold and conveyed the water works plant and assigned the contract and franchise to appellee and put it in possession of the entire works, and had no right to recover or maintain a suit for the recovery of the water rents, or any part thereof. Hence the judgment pleaded might well have gone against the St. Louis company, and yet plaintiff not be thereby estopped or barred of its right to sue for and recover upon the same causes of action. If this is so, it follows the defense set up by that plea would have been no bar, and refusing permission to interpose it, worked no injury.

Second: Appellant contends that appellee has not the legal right of action, because the contract upon which the suit is brought is not assignable at law, and if assignable, no assignment of it was made such as the law recognizes.

The city ordinance is the contract. It is between the City of Carlyle of the one part, and the Water, Light and Power

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Company of St. Louis, *its successors and assigns*, of the other part. The franchise is granted to it and its successors and assigns. The obligations assumed by it are imposed upon *its successors and assigns*, and the covenant of the city is to pay water rents, not to the St. Louis company alone, but to *its successors and assigns*. The plain meaning of the contract is, if the St. Louis company owned the plant and furnished the water it should receive the pay therefor. If its successor or assign furnished the water, the covenant is to pay such successor or assign for the same. When the works were tested and accepted, and at and during the time all the rents sued for accrued, appellee owned the real estate upon which the plant was built, and the contract and franchise had been transferred and assigned to it by the St. Louis company—not by indorsement upon the city ordinance, it is true, but, as we think, by a mode sufficient in law to effect the purpose of transfer and assignment and constitute the appellee an assign, as understood and intended by the parties to the contract. The appellant thenceforth dealt with appellee as such owner and assign, and must be held to the performance of its covenant to pay it as the successor and assign of the St. Louis company in accordance with the true intent and meaning of the contract, and a failure to make such payment to appellee constituted a breach of the contract, for which, and the damages by reason thereof, appellee had the right to institute and maintain this suit. We do not understand the statutory provisions touching the assigning and mode of assigning negotiable instruments are applicable, but think the case of *Smith et al. v. Hallett*, 34 Ind. 519, cited on behalf of appellee, is in point. It was a suit brought to recover the amount of defendant's subscription in writing which he promised to pay Lord *or his assigns*, upon condition Lord *or his assigns* should construct, or cause to be constructed a railroad, upon a certain line, etc. Lord assigned the contract, or subscription paper, by a separate instrument to a certain railroad company, and the company assigned it to the plaintiff.

The performance of the conditions of subscription was averred, and plaintiff's right to sue in his own name was raised by demurrer.

Fritts v. Fritts.

The court say: "Defendant must be held to the performance of the contract according to the intention of the parties thereto, to be discovered by a consideration of all its parts." If it had been intended that no one else could be substituted for Lord, it would not have been said that said sums of money were to be paid when Lord or *his assigns* shall have completed the contract, and then, in the body of the contract the agreement is to pay "Lord or *his assigns*." "There is nothing in the substance of the transaction which indicates in any way it was regarded as essential that Lord should construct the road. The object seems to have been to secure the construction of the road upon the specified route, and when that was done defendant got what he contracted for, and became liable to pay the amount he had promised."

Third. It is insisted the 8-inch, 6-inch and 4-inch water pipes were less in interior measurement than as required by the contract, hence no recovery could legally be had. We think there was ample evidence to justify the court in finding that 8-inch, 6-inch and 4-inch pipe of *standard* weight, as provided by the contract, was furnished, and this point is not sustained by the record. No error appears requiring us to reverse the judgment of the Circuit Court, and the same is affirmed.

Judgment affirmed.

JOHN FRITTS

V.

ELIZABETH FRITTS.

Divorce—Suit by the Husband—Extreme and Repeated Cruelty—Desertion—Refusal to Permit Sexual Intercourse—Justifiable Refusal—Evidence—Instructions.

1. In a suit by the husband it is *held*, that the evidence did not warrant a decree of divorce on the ground of extreme and repeated cruelty.
2. Refusal of the wife, without justifiable cause, to permit sexual intercourse for a period exceeding two years, is equivalent to desertion, and entitles the husband to a divorce.

36	31
138	436
36	31
54	381
36	31
54	381

3. In the case at bar it is held that the action of the husband justified the wife in refusing him sexual intercourse.

4. In the case at bar the refusal of instructions which ought to have been given, is held to be no ground for reversal.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Pope County; the Hon. O. A. HARKER, Judge, presiding.

MESSRS. JAMES C. COURTNEY and SHERIDAN & MOORE, for appellant.

MESSRS. W. S. MORRIS & SON, for appellee.

PHILLIPS, J. Appellant filed his bill in the Pope Circuit Court, charging appellee, defendant therein, with desertion for a space of time exceeding two years prior to the time of filing the bill, and also charging her with extreme and repeated cruelty. Appellee filed her answer denying the allegations of the bill. A trial was had before a jury resulting in a verdict finding the defendant not guilty, and a decree was entered dismissing the bill, and the record is brought to this court by appeal. From a careful examination of the evidence in this record, it is apparent there was petulance of manners, rudeness of language and frequent sallies of passion and threats made on the part of appellee toward appellant, but we are unable to find from the entire evidence that appellee ever attempted to strike appellant more than once, nor do we find any attempt on her part to carry out threats of personal injury. The appellant testifies that appellee made an assault on him with an axe, but does not show that she attempted to strike, or he in any way avoided or prevented the blow. The fact of the assault having been made is denied by appellee, and she is sustained by two witnesses, so that the weight of proof fails to show that allegation is true. Appellant further testifies that appellee made an assault on him with a plank, and attempted to strike him, and he caught the same in his hand to prevent the blow. The evidence shows appellant

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was whipping one of his sons severely, and the wife interfered and insisted the punishment should go no further; in the quarrel growing out of this occurrence the assault with the plank is claimed to have been made. This assault is admitted by the wife to the extent that she advanced toward the husband in a threatening manner, but the fact of striking at him is denied, and it is charged by her that when she advanced on him he desisted from whipping the boy, caught up a pole and drew the same in a threatening manner on her. Be this as it may, there is no evidence to show any other blow inflicted or attempted, or any other act of personal violence. It is further testified by appellant that she attempted to poison him, to destroy his property, to break him up; that she had become jealous of him and falsely accused him of improper intercourse with other women.

In *Birkby v. Birkby et al.*, 15 Ill. 120, the Supreme Court said, "The allegations of the cross-bill are not sufficient to authorize a decree of divorce. The substance of those allegations is, that she had become jealous of him, and accused him of improper intercourse with other women, which involved him in difficulties in the neighborhood. That she refused to attend to her household duties, and absented herself from his house, sometimes for days and weeks together; that she threatened to take his life, to burn his buildings and destroy his property." In *Vignos v. Vignos*, 15 Ill. 186, it was said: "That the husband was unkind in his treatment and tyrannical in his disposition, is most likely true, but there is no personal violence shown, unless it may probably be inferred upon one occasion, when in bed together, she was overheard to request him not to kick her; whether he had kicked her or did kick her the witness did not know, nor did the party say. It is not enough that the parties do not live happily together; threats of personal violence may have been used, and abusive language and opprobrious epithets, originating in a groundless jealousy; but this we can not hold to be a sufficient ground for divorce under our statute." In *De La Hay v. De La Hay*, 21 Ill. 251, it was held: "When the husband is the complainant, it is not sufficient to show slight acts of

violence on her part toward him, as long as there is no reason to suppose he will not be able to protect himself by a proper exercise of his marital powers, * * * and it must therefore be a clear case which will induce the court to grant a divorce on the application of the husband for the cruelty of the wife. * * * So in this case the evidence shows a desertion for weeks and even months of the time, but not for the space of two years. It likewise shows that she on one occasion attempted to commit an assault upon him with a hammer, but did no injury; but there was no evidence showing a repetition of the act."

In *Turbitt v. Turbitt*, 21 Ill. 438, it was said: "It has been repeatedly held by this court that austerity of temper, sallies of passion or the use of abusive language do not constitute extreme and repeated cruelty under our statute." In this case the proof fails to show more than one act of personal violence, and that is shown under circumstances of provocation, as the whipping of the boy was of a most severe character, the boy's shirt being stained with blood from the blows inflicted. Appellant found in the possession of appellee strychnine, from which, coupled with previous threats, he testifies to fears of being poisoned; but the purpose for which it was in her possession and for what it was used is shown by her testimony, and she kept it concealed to prevent its being handled by small children. We fail to see in this evidence anything that tends to show cause for the fears of the husband. The evidence was clearly insufficient to authorize a decree for divorce on the ground of extreme and repeated cruelty. *Von Glahn v. Von Glahn*, 46 Ill. 134; *Henderson v. Henderson*, 88 Ill. 248; *Embree v. Embree*, 53 Ill. 394. The evidence shows from 1886 to the time of filing the bill the appellant, because—as he alleges—of the quarrelsome disposition and fault-finding of his wife, ceased to occupy the same room with her, but used, as his sleeping apartment, a room in an old flat-boat, that in time of high water had been stranded near his door; refused to take his meals at the table with his wife and children, but had his meals carried to him to the porch by his daughter residing in the house with her mother.

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It further appears that during his temporary absence the wife and daughter sought to render more comfortable his room in the boat, by placing therein bed and bedding of a better character and cleanliness than that he was using, but on his return he ordered the daughter to take the same from the room.

The evidence shows that there was scarcely any communication or conversation between the husband and wife for a number of years; his testimony on that point is as follows: "Q. How long has it been since you spoke to your wife as to business, and such things as that? A. It has been ever since a couple of years after our last child was born. Q. Where did you sleep after that? A. I would sleep on the lounge by myself in the room. Q. How long did you sleep in the room? A. Until 1885. Q. Where did you sleep after that? A. Well, I would sleep with the children part of the time, and other times I would go and sleep in the front room. Q. After you quit sleeping in the room where did you sleep? A. I slept in the boat. Q. How long did you sleep in the boat? A. I slept in the boat until last spring, a year ago. Q. State the occasion of your sleeping in the boat. A. I could not sleep in the house without there always being a fuss, and I just left the whole house to them. Q. State where it was that you ate, generally. A. I generally ate at the table until the abuse got so that I got up from the table and went out on the porch." He further states, in response to the question, "State to the jury, Mr. Fritts, how long it has been since you have had sexual intercourse with Mrs. Fritts. A. Since 1883 or 1884, may be later than that. She has refused to have sexual intercourse with me since the birth of our last child." The charge for desertion and absence for two years prior to the time of filing the bill is based on the refusal of the wife to permit the husband to have sexual intercourse with her. The suit for restitution of conjugal rights, which could be brought whenever the husband or wife was guilty of substruction, a remedy afforded at common law, is not known or recognized in this State. But ecclesiastical courts, while enforcing conjugal cohabitation, did not pretend to enforce marital intercourse. *Orme v. Orme*, 2 Add. Ec. 382.

Whether the refusal by the husband or the wife to have sexual intercourse with the other during a period of time exceeding two years without justifiable cause, is desertion within the meaning of the statute, has not been determined by the Supreme Court of this State. The question was directly before the Supreme Court of Massachusetts in *Southwick v. Southwick*, 97 Mass. 327, and it was held that such refusal, although unjustified by considerations of health or physical disability, was not sufficient to support a libel by the husband for a divorce on the ground of desertion. In *Fishli v. Fishli*, 3 Litt. 337, a case where the husband had deserted the wife but before the expiration of two years wrote her a letter offering to genteelly and comfortably support her in his own house or in lodgings, as she should prefer, the Supreme Court of Kentucky held that the offer of a husband to support his wife genteelly and comfortably in his own house or in lodgings, as she should prefer, was not an offer to live with her in the relation of husband and wife, and, as she was, by the nature and terms of the marriage contract, entitled to stand in that relation to him, she was not bound to accept of an offer to stand in any other. Mr. Bishop, in his work on *Marriage and Divorce*, Sec. 779, says, with reference to this question: "Of principles relating to the question now before us, we have the following: First, to constitute desertion, there need not be an abnegation of all the duties of marriage, as just shown. Secondly, sexual intercourse is so important an element in any marriage, that without the capacity therefor it will be voidable. Thirdly, and consequently, the law holds such intercourse to be the central element of marriage, to which the rest is but ancillary. It is that, and that alone, which, out of marriage, is unlawful. A man may lawfully obligate himself to support a woman not his wife, or to support her children, or to retain her in his house as long as they both live, and to be kind to her. She may bind herself, in a corresponding way, to him. Indeed, there is but one thing which is special to marriage, and is lawful in no other relation. All else pertaining thereto a man and woman may mutually contract for, and do, without taking the first step toward marriage. If,

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then, not from any justifiable cause, but from wilfulness, or a desire to injure, or from what, in Tennessee, is known as 'malice,' a married party takes a separate room in the house, and not as a mere temporary expedient, not, in the language of Sir Christopher Robinson, 'on consideration of health,' but, as a wilful, irrevocable act, abandons and abjures forever all matrimonial intercourse, the adjudged law, speaking through its principles, rather than by resolving of the exact question, makes it desertion." Impotency is, by our statutes, made a cause for divorce, and the husband or wife would not be permitted to say in bar of a suit for divorce for this cause, that he or she never intended to have sexual intercourse with the other. And if the law will permit the refusal of marital intercourse not based upon justifiable cause, the result is the same as if impotency existed. On legal principle, we hold the refusal of the wife, without justifiable cause, to permit the husband to have sexual intercourse with her during a period of time exceeding two years, is desertion within the meaning of the law. The instructions asked by complainant, that a persistent refusal, without cause, during a period of more than two years, to at any time permit marital intercourse, was desertion within the statute, should have been given, and it was error to refuse the same.

There are instructions given for defendant that are erroneous, but ought this case to be reversed for such error? From this evidence, according to the testimony of the appellant, it has been within two years of the birth of his last child, a period of more than seven years, since he spoke to his wife in reference to "business and such things as that." The evidence shows that since that time he has spoken to her in no way except to answer, in the affirmative or negative, questions put to him by her; he refused her his society; refused to associate with her at the table; absented himself from her bed during all that time; and the uncontradicted testimony of the wife shows that, on two or three occasions after he abandoned her bed, she asked him to return to it, and to this he made no answer. Had he given her a little decent treatment it may be that he would have had no cause of complaint. It is evident

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her jealousy was aroused, and from the entire testimony we find there was cause for jealousy; the woman of whom she was jealous had been an inmate of her house; was sent away by the demand of the wife; was taken away by the husband, and when he took her away he furnished her \$20; he subsequently loaned her \$35, and yet he says the cause of the trouble originally between himself and wife was that the woman was brought to the house by the wife against his objection, because of his unwillingness to aid in her support. The testimony of the wife in reference to the compromising situation in which she found him with the woman, and the entire testimony taken together, induces the conviction that there was cause for her jealousy. The entire testimony shows the treatment of the wife by the husband to be such that we can not hold that there was no justifiable cause for her refusal. If this case was free from any error in instructions, we do not believe that a verdict finding the defendant guilty could have been permitted to stand. The verdict is in accordance with the evidence, and for the error in refusing and giving instructions ought not to be reversed. The decree dismissing the bill was proper, and the decree is affirmed.

Judgment affirmed.

36 36
53 570

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS

v.

THE BLOCK AND HARTMANN SMELTING COMPANY.

Sales—Failure to Deliver—Waiver—Construction of Contract.

In the case presented it is *held*: That a provision in a contract to furnish coal, that if the seller fails to furnish it the buyer may purchase elsewhere, is not a waiver of the seller's liability in damages for such failure.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of St. Clair County; the Hon. GEO. W. WALL, Judge, presiding.

Cons. Coal Co. v. Block & Hartmann Smelting Co.

MR. CHARLES W. THOMAS, for appellant.

MR. W. C. KUEFFNER, for appellee.

GREEN, J. This was an action of assumpsit brought by appellee against appellant to recover damages accruing by reason of the failure by the latter to deliver coal to appellee during the month of March, 1889, as required by the terms of a written contract between the parties. A jury was waived, the cause was tried by the court, a finding and judgment for plaintiff for \$337.28 damages and costs of suit resulted, and defendant took this appeal.

On behalf of appellant, it is contended that "the judgment was excessive." That the notice given appellant by the appellee to deliver coal during the month of March "was not such a one as the contract required." That before giving such notice, appellee had violated and broken the contract, and hence appellant was not bound to deliver the coal called for by the notice. And, lastly, that the provision in said contract, "In case of inability of said party of the first part to fulfill its obligations in accordance with this agreement, said party of the second part shall have the right to buy coal from wherever or from whomever it may choose," was a waiver of damages in such case, for a failure by appellant to furnish coal as required by the terms of the contract. In other words, the only penalty contemplated by the parties for such breach of contract was appellant's loss of profit upon the coal purchased by appellee from other parties. This is not our construction. The clause above quoted follows immediately after this clause of said contract: "It being understood and agreed that said first party will not be required to furnish coal under this agreement, during any portion of time when prevented by general strike or strikes, or other causes beyond its control, from handling the product of its mines," and should be construed in connection with it in order to ascertain the real intent and understanding of the parties. Adopting this method we reach the correct conclusion that appellant should be absolved from liability for such breach for inability to fulfill

its obligations occasioned by the causes named, and none other, viz., *general strike or strikes or other causes beyond its control*, and unless these causes, or one of them, prevented, appellant was bound to furnish the coal as it had agreed to, or to respond in damages for its default.

After a thorough examination of the record, and a careful consideration of all the reasons urged for reversal in the printed argument on behalf of appellant, we are satisfied the damages assessed were not excessive, and the notice to deliver coal was not defective, but was such an one as the contract required. The breach of the contract by appellant was proved as averred, and appellee did not break its contract or forfeit its right to recover by its purchases of coal from other parties under the facts proven. Nor was appellant prevented from delivering the coal, as required, by any of the causes above mentioned, and hence was not absolved from liability for such breach. In our opinion the finding and judgment of the Circuit Court is fully sustained by the evidence, and we perceive no reason for reversing the same.

The judgment is affirmed.

Judgment affirmed.

WILLIAM CASSON

v.

W. B. RASBACK ET AL.

Principal and Surety—Release of Surety—Estoppel—Instructions—Note.

Misrepresentations by the payee of a note to one of several sureties, though they may release him, do not affect the liability of the other sureties.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Marion County; the Hon. BENJ. R. BURROUGHS, Judge, presiding.

Casson v. Rasback.

On July 1, 1885, Cal. Martin, John Besant, Jr., W. B. Rasback and W. A. Ingram made their promissory note to William Casson, due twelve months from date, for \$100, with interest at eight per cent per annum; Martin was the principal and the others sureties on the note. Summons was served on the three defendants, the sureties, the principal not found. On trial the note was offered in evidence and thereupon the defendant John Besant, Jr., testified as follows: "Am one of the defendants in this suit. I have seen this note. This is my signature. I am on as security. Cal Martin is the principal. About the time it became due, plaintiff came to me and to see Cal. Asked if I wanted that note settled. I wanted to have the note paid; Cal. was getting in debt; so I went to Casson. This was about a month after the first conversation. I told Casson to make his money as I wanted to be released, as he was shaky. Casson called a few days after, it may have been fifteen. He says, 'You are all right, the note is settled,' and I thought it was. I never knew no more about the note until I received a notice to come before the squire to pay the note. Casson came and told me the note was settled. I can't say anything about extension. My first conversation with Mr. Casson may have been a few days after the note was due. In about a month I went to Mr. Casson; my brother and one or two were there. He says, it is all right, the note is settled." The plaintiff states that the only conversation he had with Rasback was as follows: "I had a short conversation with Mr. Rasback about a year ago in Centralia, Illinois, about as follows: I met him on the street of that city—he was in a buggy—and asked him where Cal Martin was. He said, 'What for, Billy?' I answered, 'It is pretty near time that money was paid.' He answered, 'Isn't that paid yet?' I said, 'No.' Then he answered, 'I will hunt him up.' This is all and the only conversation I had with them or either of them concerning the note in controversy."

The court instructed for defendant as follows: "The court instructs the jury that if you believe from the evidence that the plaintiff stated to the defendant Besant that the note in controversy was settled, and thereby caused defendant to be-

lieve that said note was paid, and thereby prevented him from giving said plaintiff notice in writing to proceed to collect said note, and if you further believe from the evidence that defendant was trying to get plaintiff to proceed against the principal at the time when said principal might have been compelled to pay the same, and that the defendant, on account of said statement of plaintiff, desisted from said efforts, you should find for defendants.

Verdict for defendants and judgment. The plaintiff brings the record to this court by appeal.

Messrs. G. PIERCE DUNCAN and CASEY & DWIGHT, for appellant.

Messrs. W. & E. STOKER, for appellees.

PHILLIPS, J. The only evidence before the jury fails to show an extension of time by the payee to the principal and if the testimony of Besant be accepted as true without reference to the testimony of the plaintiff and it be admitted that the plaintiff induced him not to give a notice in writing to proceed to collect the note and thereby estopped the plaintiff as to Besant, we fail to see how that fact could be of advantage to the other defendants. The instruction by the court on this evidence—"If defendant was trying to get the plaintiff to proceed against the principal at a time when said principal might have been compelled to pay the same, and the defendant on account of said statement of plaintiff desisted from said efforts you should find for defendant," was erroneous. There was no evidence to show that Besant was acting for his co-defendants in any way or that they desired the note collected. Even if it be admitted that an estoppel existed as to Besant, there is no evidence on which to base an estoppel as to the other defendants. We deem it unnecessary to decide the question as to whether an estoppel existed in this case as it must be submitted to another jury. For the error in instructions to the jury the judgment must be reversed and the cause remanded.

Reversed and remanded.

Schumann v. Pilcher.

GEORGE SCHUMANN

v.

J. W. PILCHER.

Exemptions—Execution—Schedule—Signature—Evidence—Trespass.

1. It is in the discretion of the court to permit evidence to be given in rebuttal which should have been offered in chief.

2. If an execution debtor writes his name in the body of the affidavit to the schedule of his personal property required under the exemption law, the signature is sufficient.

3. The fact that the name so written is in a different handwriting from the rest of the affidavit is sufficient to put the officer receiving the schedule on inquiry as to whether the name was written by the debtor.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Fayette County; the Hon. JACOB FOUKE, Judge, presiding.

Messrs. COX & WILLS, for appellant.

No appearance for appellee.

REEVES, P. J. The action is trespass, brought by appellee against appellant, for taking and carrying away certain personal property. Appellant justified the taking by alleging he was a constable, and as such, received an execution issued upon a judgment in favor of D. S. Morgan & Co., against appellee, and levied the same upon the property described in the declaration, and sold the same to satisfy the execution. Replication was filed traversing this plea, and the cause was submitted to the court for trial without a jury. The plaintiff proved the ownership and possession of the property, and the taking by defendant, and the value of the property taken, and rested. The defendant offered the judgment of Morgan & Co. against plaintiff, and the execution issued thereon, and proved that the property taken by him was taken upon this

36	43
36	157
36	43
76	255

execution. The plaintiff then offered proof that he was the head of a family, residing with the same; that he made out a schedule of all his personal property and delivered it to the defendant constable, which schedule the constable declined to recognize, but proceeded to levy the execution, and advertise and sell the property.

This evidence was objected to "for the reason that it was not proper rebutting testimony, but was part of the plaintiff's case in chief," and as it is put in another objection to the same testimony, because it is not proper rebutting testimony.

The bill of exceptions nowhere shows that this evidence was objected to as inadmissible under the pleadings as they then stood. Had this objection been interposed, doubtless the plaintiff would then have asked leave to file the additional replication, which was subsequently filed, setting forth, in answer to the plea alleging the judgment and execution and the taking of the property on the execution, the making and delivery to the constable, of the schedule, and leave to file such a replication would have been granted and the objection thus obviated. After the evidence was all heard, the court below granted leave to file such a replication and the court rightfully overruled appellant's motion to strike it from the files. Appellant knew fully about the schedule, as he admits he received it within the time given appellee by the statute to make and deliver a schedule. The point made against the schedule is based upon the face of the schedule and not upon any extrinsic evidence. Appellant was as well prepared to make his objection to the schedule as if it had been set up by replication before the trial was entered upon and no possible injury resulted to him by reason of the action of the court, in permitting it to be filed after the evidence was in. It was discretionary with the court to permit the evidence to be given in rebuttal even if it should have been offered in chief.

It is urged that the schedule was not in compliance with the statute, and the constable was not bound to regard it, and had the right to proceed the same as if no schedule had been presented to him. It was in words and figures following, to wit:

Schumann v. Pilcher.

"Schedule of personal property.—The following is a full list of personal property now owned by me. I am the head of a family and living with same, and claim the benefits of the exemption laws of this State: 2 mares, 2 suckling colts, 1 blind horse, 1 buggy, 20 acres of growing corn, 140 bushels of oats, 10 head of geese, 2 dozen chickens, 1 cook stove and utensils, 1 dining table, 1 bureau, 1 safe, 1 set knives and forks, 1 set cups and saucers, 1 set plates, 2 dozen cans fruit, 1 organ, 1 bed and bedding, 1 lounge, 1 set chairs, 1 rocking chair, 1 silver watch, 1 violin, $1\frac{1}{2}$ acre of potatoes. J. K. Pilcher holds a chattel mortgage on the two said mares for \$100."

"STATE OF ILLINOIS, }
Fayette County. } ss. I (J. W. Pilcher) being duly sworn
say that the above list is a full and complete schedule of all of the personal property of every kind, character and description now owned by me, including money on hand and debts due and owing to me.

Subscribed and sworn to before me this 7th day of _____
1889.

D. D. SCOTT, [SEAL.]
Justice of the Peace."

Appellee testified that he wrote his name where it appears in the affidavit to the schedule. So, also, testifies Scott, the justice of the peace who swore appellee to the schedule. Both these witnesses testified that the paper was made out, signed and sworn to, on the 7th day of August, 1889, and on this day it was delivered to the constable. We think the proof did, as a matter of fact, show that appellee subscribed and was sworn to the schedule. The name of appellee, as it appears, was below the schedule, and so the requirement of the statute, that it should be subscribed by the execution debtor, was literally complied with. As to the affidavit, it is not necessary that the name should be written at the end of it. Where the name is written so as to give authenticity to the whole instrument, it does not signify in what part it is written. "I, A B, promise to pay," etc., when written by A B, has been held to be a good signature. Taylor v. Dob-

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bins, 1 Stra. 399. Even in case of a will, the testator's signature may be in any part of the will, at the beginning, as "I, A B," etc., at the bottom, or in the margin. Lemayne v. Stanley, 3 Lev. 1; 1 Freem. 538; 1 Jarman on Wills, p. 70; Allen v. Bennett, 3 Taunt. 169; Tobb v. Stanley, 5 Ad. & E. (N. S.) 574.

It is argued that appellant had a right to treat the name of appellee as it appears in the affidavit as written by the person who prepared the schedule and affidavit, and that, to him at least, it was the same as if appellee had not signed it. It appears that the schedule and affidavit, except the name "J. W. Pilcher" were written by Scott, the justice of the peace. Unless there was a marked similarity in the handwriting of Pilcher and Scott, the fact that Pilcher's name was in a different handwriting from the rest of the paper was sufficient to put the constable upon inquiry and if he chose to omit inquiry which he should have made and which would have disclosed the truth of the matter, he must be held to have done so at his peril. It would not do to permit constables upon technical objections to fritter away the benefit intended by the Legislature to be conferred upon the family by the exemption statute. A substantial compliance with the statute is all that should be required. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE CITY OF CENTRALIA

V.

CATHERINE J. BAKER.

Municipal Corporations — Personal Injuries — Negligence — Defective Sidewalks — Evidence — Instructions.

1. In an action against a city for personal injuries sustained by reason of a defective sidewalk, this court declines to interfere with a verdict for plaintiff.

2. A person not knowing of a defect in the sidewalk has a right to presume it is safe, and need not keep her eyes on the walk.

3. An "unsafe" sidewalk is not "in a reasonable condition of repair."

City of Centralia v. Baker.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Marion County; the Hon. WM. H. SNYDER, Judge, presiding.

Appellee was injured by a fall upon a sidewalk on the north side of Broadway between Locust and Oak streets in the city of Centralia, occasioned, as appellee claims, by a defect in the sidewalk. The sidewalk was some nine feet in width and made of boards. The stringer near the street had decayed and would not hold nails. The boards were oak and one of the boards in particular being loose at the outer edge of the walk, had become warped and was raised some two or three inches above the level of the walk and this extended back from the outer edge of the walk for a distance of three or four feet. This was the most public place in the town and was in front of the old National Bank. There were steps from the sidewalk leading up to the bank entrance and these steps extended about two feet on the walk. A good many people usually congregated about this place on the walk. Mrs. Baker, at the time of the injury, was going east. Two persons were going west at the same time, and they passed to the right next to the bank, and she went also to the right and toward the outer edge of the walk. She caught her foot in the board that stood above the level of the walk and fell. Persons were standing next to the bank and some on the south edge of the walk. Mrs. Baker was in search of a man to saw wood. She says that just as she came to the bank corner she thought of the man she was looking for, and cast her eye over the crowd of persons standing there to see if he was there. Other witnesses say that she seemed to be looking for some one; that she was not looking down. It was shown that the walk had been in the condition described for some considerable time.

Messrs. G. PIERCE DUNCAN and W. & E. L. STOKER, for appellant.

Messrs. CASEY & DWIGHT, for appellee.

REEVES, P. J. Appellant insists that the sidewalk was not dangerous. The true test is, was it in a reasonably safe condition for the use of persons traveling over it, using ordinary care for their personal safety? This question was fairly submitted to the jury, and they found that it was not. We are not inclined to disturb their finding. We think the evidence will support the verdict on this point.

It is also urged that appellee was not using the degree of care that the law imposed on her. The only support for this contention is that she was not looking down at the time of the accident—was not using her eyes to direct her footsteps. If we understand the position of appellant on this point, it is that unless a person is constantly looking at the place where he is about to put his foot he is guilty of negligence. We think this states the duty of one passing along a public sidewalk too strongly. This would be the highest degree of care, while the law only requires ordinary care. It is conceded that one may not shut his eyes and blindly walk into danger, but that a foot passenger upon a public sidewalk is bound to keep his eyes, at every step, upon the place where the next step is about to be taken, we can not concede. In passing over a known dangerous place such, undoubtedly, would be the rule, but we can not assent to the position that this must be the uniform and constant rule, in order to exempt one from negligence. *Owen v. City of Chicago*, 10 Ill. App. 465. Appellee says she did not know of the defect in the walk, and she had a right to presume that the walk was safe. *City of Macomb v. Smithers*, 6 Ill. App. 470; *City of Chicago v. Hickok*, 16 Ill. App. 142. Upon the whole evidence we think appellee was exercising the degree of care which the law imposed upon her.

We perceive no error in giving or refusing instructions. The first of the plaintiff's given instructions could not, when read with the other instructions in the case, have misled the jury. The criticism upon the second and fourth is verbal, and, while strict accuracy was not observed in drawing these instructions, we find in them no reversible error. We do not see how, if the sidewalk was unsafe, it could be said to be in

City of Anna v. Leird.

a reasonable condition of repair, which meets the objection in the fifth instruction. The sixth instruction, as copied in the record, it is conceded, was not given on the trial which resulted in the judgment now before us. The instructions asked by defendant which were refused by the court, were properly refused.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE CITY OF ANNA
V.
ED. LEIRD.

Intoxicating Liquors—Sale—Question for the Jury.

In a suit by a city to recover the penalty for selling intoxicating liquors, this court declines to interfere with a verdict for defendant.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Union County; the Hon. ROBT. W. MCCARTNEY, Judge, presiding.

Mr. H. F. BUSSEY, City Attorney, for appellant.

Mr. W. C. MORELAND, for appellee.

GREEN, J. This suit was commenced before a justice of the peace to recover from defendant the penalty for an alleged violation of a city ordinance. The jury on the trial found defendant not guilty, and the city appealed to the Circuit Court, where the cause was again tried with a like result, whereupon the city took this appeal.

The violation charged is, that defendant sold intoxicating liquor, to wit, intoxicating cider, within the corporate limits of said city, without a license or permit from the city coun-

cil. The character of the cider sold by the defendant was a question of fact to be determined by the jury from the evidence. They found it was not intoxicating, and sufficient evidence appears to warrant such finding. The evidence was conflicting upon this material question; it was the province of the jury who saw and heard the witnesses while testifying, and who were the judges of the credibility and weight of the testimony, to settle this conflict, which they did, and found for the defendant. We do not feel authorized to disturb the verdict. The first instruction given the jury on behalf of defendant was not proper, but we can not say, in view of the whole series of instructions given, the jury were misled or the error in giving said first instruction is sufficient to require a reversal of the judgment.

The judgment is affirmed.

Judgment affirmed.

36	50
45	598
36	50
47	494

THE CITY OF EAST ST. LOUIS, FOR USE, ETC.,

V.

ALEXANDER FLANNIGEN ET AL.

Municipal Corporations—Indebtedness—Contract for Lighting Streets—Levy—Appropriation—Warrants—Action on Treasurer's Bond.

1. Where there is an agreement to furnish gas for street lights, payment to be made monthly as the gas is furnished, no present liability is created, and warrants drawn for gas furnished after the tax levy, against a fund appropriated for the purpose, are valid.

2. Warrants showing on their face that they are payable "only from the appropriation of the taxes * * * appropriated and levied for the street light fund, when collected," are a sufficient compliance with the statute requiring them to show upon their face that they are payable "solely from said taxes when collected, and not otherwise."

[Opinion filed June 13, 1890.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. WM. H. SNYDER, Judge, presiding.

This suit was brought in the name of plaintiff in error, for the use of Griswold, against Flannigen and his sureties upon his bond as treasurer of said city. Defendants demurred generally to plaintiff's second amended declaration; the demurrer was sustained, and plaintiff electing to abide by its declaration as so amended, final judgment for defendants was entered, to reverse which this writ of error was sued out.

The second amended declaration, after averring that Flannigen was city treasurer of said city and the execution and acknowledgment of his official bond by himself and by his co-defendants as sureties, sets out the bond and acknowledgment *in hæc verba*; avers the filing and approval of the bond and that Flannigen qualified and took upon himself the duties of treasurer, etc., and then it is further averred, substantially, as follows:

And the plaintiff in fact says, that the said Alexander Flannigen has not faithfully discharged all the duties required of him by law as such treasurer, but has neglected and refused so to do, to the injury of the plaintiff, for the use aforesaid. And for assigning a breach of the condition of the said writing obligatory, the plaintiff says, that after the appointment and qualification of said Flannigen as such treasurer, and after the making of said writing obligatory, and while said Flannigen was such treasurer, the fiscal year of the said city of East St. Louis for the fiscal year 1886 commenced on the 1st day of July, 1886 and that on the 31st day of August, 1886, during the first quarter of the said fiscal year, the said city council of said city duly passed its annual appropriation ordinance for said fiscal year of said city, and thereby appropriated for the municipal expenses of said city for said fiscal year, in the aggregate, the sum of \$113,056, of which amount the sum of \$7,500 was specially appropriated for lighting the streets of said city, which ordinance was duly approved by the mayor of said city on the 1st day of September, 1886, and was thereupon, on the 1st day of September, 1886, within one month from its said passage, duly published as required by law, in the East St. Louis Signal, a newspaper then published in said city; and that, on the 14th day of September, 1886, being

before the third Tuesday of the month of September, of said year, the city council of said city, having ascertained the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy for that fiscal year, duly passed an ordinance whereby it levied and assessed upon all the property subject to taxation within said city, as assessed and equalized for State and county purposes for the year 1886, a tax amounting, in the aggregate, to the sum of \$64,129, of which amount the sum of \$7,500 was specially appropriated and set aside for lighting the streets of said city, which said ordinance was, on the 15th day of September, 1886, duly approved by the mayor of said city, and thereupon, on the 16th day of September, 1886, duly published according to law, within a month of its passage, in the East St. Louis Signal, a newspaper then published in said city of East St. Louis, and that thereupon a duly certified copy of said last ordinance was duly filed with the county clerk of the county of St. Clair, in which county said city of East St. Louis is situated, and said tax levy was thereupon duly extended according to law, upon the books of the collector of State and county taxes within said city. Plaintiff further avers that at the beginning of the fiscal year, 1886, of said city, said city was, and ever since has been, indebted beyond the constitutional limit fixed and determined by section 12, article 9, of the present Constitution of this State, it being indebted to an amount exceeding five per cent on the value of the taxable property of said city, as ascertained by the last preceding assessment for State and county taxes, and that said city was then and ever since has been, incapable, under the provisions of the present Constitution of this State, of contracting any further indebtedness.

And that said city then and there by its council engaged said W. D. Griswold and contracted with him to light the streets of said city during the fiscal year 1886 at a certain price per month, it was then and there agreed upon that the lighting of said street was an ordinary and necessary expense of said city and that said city ever since the beginning of its said fiscal year had no money in its treasury to defray its ordinary

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and necessary expenses, and that said city then and there promised said Griswold to issue to him in payment for his services in lighting said streets its warrants to be drawn against and in anticipation of said taxes, so appropriated and levied for lighting the streets of said city for the fiscal year 1886, as aforesaid, and that said Griswold, after said city had by its city council made its said tax levy in pursuance of said contract, did light the streets of said city during the month of October 1886, and after the end of said month rendered this bill for said lighting to said city at the stipulated price agreed upon, said bill amounting to the sum of five hundred and nine 85-100 dollars, which bill was allowed and approved by the proper authorities of said city, and that thereupon said city, having provided that warrants might be drawn against said taxes so levied as aforesaid, and in anticipation of the collection thereof, by its proper authorities and order of its city council, and after the levy of said taxes as aforesaid, issued to the said Griswold its certain tax warrant for the amount so allowed him as aforesaid, and in payment of said bill for said month of October, which warrant was duly signed by the mayor and countersigned by the city clerk of said city, and sealed with the seal of said city, and was specially drawn against said taxes, so specially levied and appropriated for lighting said streets during said fiscal year, and which warrant was in words and figures as follows, to wit:

"No. 1368. City Tax Warrant. \$509.85
EAST ST. LOUIS, ILL., March 14, 1887.

Treasurer of the City of East St. Louis:

From the taxes of the year 1886, appropriated and levied for the street light fund, when collected by you, pay W. D. Griswold or bearer, the sum of five hundred and nine eighty-five one hundredths dollars, being in full discharge for lighting streets, October, 1886, and payable out of said appropriation only. The taxes to be collected for this fund are specially set apart and pledged to the payment of this warrant which is also receivable for such taxes.

MAURICE JOYCE, Mayor.

Countersigned :

T. A. CANTY, City Clerk. [SEAL.]”

That said warrant was drawn for an ordinary and necessary expense of said city and against said tax specially levied and appropriated for lighting the streets of said city as aforesaid, and amounted, together with other warrants that had been drawn against said fund, to less than seventy-five per cent of the total amount so levied as aforesaid for lighting said streets. And that there was also then and there, at the beginning of said fiscal year and from thence hitherto, an ordinance of said city duly passed and in full force, which provides that all warrants of said city drawn on its treasurer shall be drawn against one particular fund or appropriation only, and shall be paid by city treasurer on presentation, if there be any money in the treasury belonging to such fund, and which ordinance also made it the duty of the city treasurer of said city to keep a separate account of such fund or appropriation, and the debts and credits belonging thereto, and whenever he received any money collected by the county collector, or upon any general tax levy of said city, to credit each fund with an amount bearing the same proportion to the total amount received, that the whole appropriation applicable to that fund bears to the whole tax levy of that year, and which ordinance further made it the duty of said treasurer to pay out the money of said city coming into his hands as treasurer as aforesaid on warrants drawn on him by order of the city council of said city as aforesaid, when signed by the mayor and sealed with the city seal, and countersigned by the city clerk.

The plaintiff further avers that the said warrant constituted an equitable assignment of five hundred and nine 85-100 dollars of the *pro rata* part of the taxes that might be collected for said city under said tax levy, and specially appropriated for lighting the streets of said city; and that the said Griswold still is, and always has been, the holder of said warrant, of all of which the said Flannigen, treasurer as aforesaid, then and there had notice. And that since the issuing of said warrant as aforesaid, there has come to the hands of said Flannigen, as treasurer as aforesaid of said city, a large sum of money, to wit, the sum of \$18,637, collected by the proper offi-

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cer, of the said general tax levy of said city for the fiscal year 1886, so levied and appropriated as aforesaid for said fiscal year; and that the *pro rata* share thereof, specially appropriated for, and set aside to and for lighting the streets of said city during the said fiscal year is, to wit, \$2,179, and that it then and there was the duty of said Flannigen, as treasurer aforesaid, to set aside said *pro rata* part of, to wit, the sum of \$2,179, and to pay out the same on warrants drawn, or to be drawn, against the said appropriation for lighting the streets of said city, by order of said city council, when signed by the mayor and countersigned by the city clerk, and sealed with the seal of said city.

And that said Griswold gave notice to said Flannigen, while he was such treasurer, and before said money came to the hands of said Flannigen as aforesaid, that he, the said Griswold, would be entitled to said money to be collected for said fund appropriated for lighting said streets, under his said contract with said city, and presented to him his said warrant, drawn against said appropriation as aforesaid; and that said Griswold, after said money came to the hands of said Flannigen and while the latter was still such treasurer, again presented said warrants to said Flannigen as such treasurer, and demanded payment thereof. And although the said Flannigen, as such treasurer, then and there had, and ought to have had in his hands, as the proceeds of said tax levy for said year 1886, a sufficient sum of money belonging to said appropriation for lighting said streets to pay said warrant in full, and although it was his duty to pay said warrant on presentation, yet the said Flannigen failed and neglected and refused, and still fails and neglects and refuses, to pay said warrant, or any part thereof, and has wilfully misapplied said money for other purposes, and has converted the same to his own use.

The assignment of the second breach counts in all respects on the same state of facts, and averments are the same, except the amount of bill and the name of the month, as the first, and except that the demand is for street lighting for the month of November, 1886, and is so stated in the warrant, and the warrant is as follows:

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"No. 1369. City Tax Warrant. \$554.15.

EAST ST. LOUIS, ILL., March 14, 1887.

Treasurer of the city of East St. Louis :

From the taxes of the year 1886, appropriated and levied for the street light fund, when collected by you, pay W. D. Griswold, or bearer, the sum of five hundred and fifty-four 15-100 dollars, being in full discharge for lighting streets, November, 1886, and payable out of said appropriation only. The taxes to be collected for this fund are especially set apart and pledged to the payment of this warrant which is also receivable for such taxes.

Countersigned :

MAURICE JOYCE, Mayor.

T. A. CANTY, City Clerk. [SEAL.]”

And the plaintiff alleges that by means of the premises an action has accrued to the plaintiff to demand of the defendants for the use aforesaid, the sum of \$100,000 above demanded. Yet the defendants, though requested, have not paid to the plaintiff, for the use aforesaid, that sum of money, or any part thereof, but refuse so to do, to the damage of the plaintiff, for the use aforesaid, of \$3,000, etc.

Mr. W. C. KUEFFNER, for plaintiff in error.

Messrs. A. S. WILDERMAN and J. M. HAMILL, for defendants in error.

GREEN, J. This case was before us at the August term, 1887, and will be found reported in 26 App. Ct. Rep. 449. We reversed the judgment of the Circuit Court, for error in sustaining a general demurrer to the whole declaration, two counts of which, in our judgment, stated good causes of action. The case was remanded, and when it was redocketed in the Circuit Court the plaintiff took a non-suit as to the three assignments of breaches, counting on the warrants issued for street lighting furnished before the tax levy was made, held by this court to be obnoxious to the general demurrer, and filed the declaration now under consideration, in which breaches are assigned for the non-payment of the two war-

rants only issued for street lighting for the months of October and November, 1886. These two breaches assigned are the same in substance, taken with the other averments in the declaration, which this court held sufficiently stated good causes of action. No reason is now perceived for changing our ruling and decision in that regard. All the material objections urged against the sufficiency of the declaration now before us, were quite as applicable to the declaration already examined and passed upon by this court, and are fully considered and discussed in the opinion published in the report of the case above cited. We adhere to the views expressed in that opinion and deem it unnecessary to again go over the same ground, or repeat all that is there said. Our attention is invited, however, to *Prince v. City of Quincy*, 21, N. E. Rep. 768, and counsel for defendants in error insist it is a case in the decision of which the Supreme Court defeats plaintiff's grounds for recovery set up in this declaration, and in effect overrules the decision of this court at said August term, 1887, holding said two counts of the declaration good. We have examined the case relied on, and the opinion of Pleasants, J., quoted and approved in the opinion of the court, but do not understand the facts in that case to be substantially the same as the facts alleged in the declaration in this case. The contract with Prince created by the ordinance, was that the city *shall pay* said Prince in monthly installments from the time water is turned on, etc., and in the opinion it is said:

“Thus the contract was not to provide for payment, but to pay, not out of a particular fund, but absolutely, and the obligation for the delivery of the money was not cast upon its officers, but assumed by the corporation.” We are considering a declaration in which it is averred that the two warrants, for the non-payment of which by the city treasurer, breaches are assigned, were delivered to, and accepted by, Griswold, in full satisfaction for services rendered and material furnished by him for street lighting. These warrants, by their very terms, were payable only out of a specific fund, which had then been appropriated to the payment thereof, and the tax

levy had been made to raise that fund. The money collected for that purpose under and by virtue of the tax levy, sufficient to pay said tax warrants, it is averred, was in the hands of the treasurer, and it became his duty to pay them when presented for payment. The city gave these warrants and Griswold accepted them in exchange for services rendered and material furnished for street lighting for October and November, 1886, and for such services and material furnished, no debt against the city, contingent or otherwise, was created or existed. In the former opinion it was said that warrants drawn upon the treasury in payment of gas furnished prior to the actual levy of the tax, were illegal and void. Those, however, issued in payment for gas furnished after the tax levy, rest upon a different basis. It was held in *East St. Louis v. E. St. L. G. L. & C. Co.*, 98 Ill. 415, that the city had general power to enter into contracts for furnishing of gas for city purposes, and such contracts were within the scope of its authority, and, having such general power over the subject-matter of the contracts, the courts should not destroy the contracts made by the party further than some good reason requires. If the contract with Griswold had been made after the passage of the general appropriation bill, wherein the fund for lighting streets was set aside and specified, and the tax levy had been actually made, it will be conceded such contract would be free from all legal objection, and not in violation of the constitution, as construed by the Supreme Court in *City of Springfield v. Edwards*, 84 Ill. 626, and *Law v. People*, 87 Ill. 385.

The city would then have something to exchange for the gas furnished. Having, then, the general power over the subject in question, there seems to be no good reason for holding that if, after such tax levy was actually made, Griswold furnished gas which was used and accepted by the city, it might not pay for it by warrants drawn against this particular fund, and in determining the amount to be paid therefor adopt the contract price. This view is supported by *East St. Louis v. E. St. L. G. L. & C. Co.*, *supra*, where substantially the same question was raised and decided in favor of the company.

In this connection we will add that a writ of error was sued out of the Supreme Court by defendants in error here, and our former decision in this cause was taken up for review. While it is true that court held our judgment was not such as by the statute could be taken upon error or appeal, and for that reason dismissed the writ, yet the record was before that court, and if the Prince case was understood and intended to have the effect insisted upon by counsel for defendants in error in deciding the questions here presented, it seems to us some intimation would have been given in the opinion to the effect that the decision in that case determined the vital questions involved here and thereby have induced the abandonment by plaintiff in error of the further fruitless litigation of the subject-matter in controversy in this suit.

Some other questions are raised on behalf of defendant in error which were not presented before, and we will now dispose of them. It is urged the warrants described in the declaration are not drawn to conform to this provision of the statute authorizing their issue. "Provided, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise." The warrants in question upon their face are payable *only* from the appropriation of the taxes of the year 1886, appropriated and levied for the street light fund, *when collected*. This is a sufficient compliance with the spirit and letter of the said provision.

It is also claimed that warrants such as these are invalid, unless provision be made for them *after* the making of the tax levy against which they are drawn. The declaration avers and the demurrer admits that the tax levy against which warrants were drawn had been made when the services were rendered for which said warrants were issued and taken as payment, and as before held, they were then properly and lawfully issued and paid over for that purpose. The warrants were also signed by the mayor, and countersigned by the city clerk. The only other question we shall notice is as to the jurisdiction of this court. It is claimed the construc-

tion of the constitution, and the validity of the act of May 31, 1879, under which the authority to issue the warrants is given, are involved, hence the writ of error should have been sued out from the Supreme Court. The construction of Sec. 12 of Article 9 of our State Constitution, and the validity of the act in question, are no longer open questions which may be raised or involved in this case, but have been settled in *City of Springfield v. Edwards*, 84 Ill. 626, and *Law v. People*, 87 Ill. 385, as we understood the decisions in those cases.

We think the Circuit Court erred in sustaining the demurrer and for that error reverse its judgment and remand its cause.

Reversed and remanded.

FREDERICK B. SUPPIGER ET AL.

V.

TIMOTHY GRUAZ.

Assignments—Presentation of Claims—Replevin—Loss of Property by Fire.

1. Where a claim against a bankrupt estate is in suit and undetermined during the three months after publication of notice by the assignees, during which claims are required to be presented, they will not be barred for non-presentation.

2. Destruction by fire, while withheld, of property wrongfully replevied, does not absolve plaintiff from liability under the replevin bond.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Madison County; the Hon. WM. H. SNYDER, Judge, presiding.

On April 1, 1889, Timothy Gruaz, appellee, presented to the appellants, assignees of the bankrupt firm of F. Ryhiner & Co., the following claim against the bankrupt estate, and the

36	60
41	478
36	60
137*	216
36	60
46	654

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assignees did not file the same in the County Court until August 6, 1889: "Timothy Gruaz, being duly sworn, on oath says that the claim (a copy of which is hereto attached) of himself against the above named firm of F. Ryhiner & Co., is for money due on value of machinery and tools, levied upon to satisfy a judgment in favor of said Timothy Gruaz, withheld by replevin and never returned, and that there is now due to the said Timothy Gruaz from the said firm of F. Ryhiner & Co., after allowing all just credits, payments, deductions and off-sets, the sum of fifty-six hundred dollars. Deponent further says that the claimant's post-office address is Highland, Madison County, Illinois. TIMOTHY GRUAZ."

"Subscribed and sworn to before me this 1st day of April, A. D. 1889.

"JOHN BALSIGER, J. P."

COPY OF CLAIM.

"1884, March 31.

'To Ryhiner & Co., Dr.,

1884, March 31.

To TIMOTHY GRUAZ, Highland, Ill.

To value of tools and machinery, said to be replevied and not returned after dismissal of replevin suit, \$4,000. Interest five years at six per cent, \$1,600. Total, \$5,600."

Exceptions by assignees to the claim were filed and the County Court allowed Gruaz \$4,000 thereon, and ordered that the assignee should pay no dividend upon the claim until after the payment in full of all claims before presented and allowed by the court. From this order Gruaz appealed to the Circuit Court, where the cause was by agreement tried by the court upon the following stipulations: "The parties in the above cause now pending and undetermined in said court do hereby stipulate that the facts of the matter in controversy are as follows: That at the March term, A. D. 1884, of the Circuit Court of Madison County, Illinois, Timothy Gruaz, the plaintiff in this suit, obtained a judgment against the Highland Mechanical Works for the sum of \$5,647.10; that an execution was issued on said judgment dated _____, A. D. 1884, and levied on the following

described property, by the sheriff of Madison county, Illinois, on the — day of April, A. D. 1884, viz.: (Here follows in detail a description of a lot of tools and machinery used in a foundry, as the property of the Highland Mechanical Works.) That the sheriff of Madison county, Illinois, took possession of said property under the said levy, and placed Jacob Brunsweiller in custody of the same; that on the 10th day of May, A. D. 1884, Frederick C. Ryhiner, Adolph E. Baudillier and Morris Huegy, under the firm name of F. Ryhiner & Co., brought a replevin suit in the Circuit Court of Madison County, Illinois, against George Hotz and Jacob Brunsweiller for the above described property; the replevin bond was for the sum of \$4,000; that a writ of replevin was issued on that day and delivered to the coroner of Madison county to execute, who on May 19, 1884, replevied the property and delivered the same to the plaintiffs, F. Ryhiner & Co.; that the said replevin suit was continued through the various terms of the Madison County Circuit Court until the October term of the year 1888, when the venue of said suit was changed to the Circuit Court of Jersey County, Illinois, on the application of Ryhiner & Co., made prior to the assignment hereinafter mentioned. At the March term of the Jersey County Circuit Court said suit was dismissed without a trial on the merits, and a writ of *retorno habendo* awarded.

On the 4th day of May, A. D. 1885, the said firm of Ryhiner & Co. made an assignment for the benefit of their creditors, under the laws of the State of Illinois, to the defendants Frederick B. Suppiger, John H. Hermann, Joseph C. Ammann and Adolph Ruegger, and that on the 13th day of May of said year, they made and executed a supplementary deed of assignment to the same parties, which deeds were duly filed in the clerk's office of the County Court of Madison County, Illinois; that said assignees qualified as such, and have since been acting under said deed of assignment as the assignees of said estate. It is also admitted that they are creditors of said estate. It is further stipulated that on the 22d day of August, 1885, there was filed in the County Court of Madison County, Illinois, by said assignees, a true and full list under

Suppiger v. Gruaz.

their oaths of all such creditors of F. Ryhiner & Co. as had claimed to be such at that time, with a true statement of their respective claims, and affidavit of publication of notice, and a list of creditors, with their places of residence and date of mailing, to whom notice had been sent by mail, duly verified as required by statute; that said assignees gave due notice to creditors to present their claims, as provided by the statute in regard to assignments for the benefit of creditors, by publication in a newspaper published in the said county of Madison, the first insertion being on the 20th day of May, A. D. 1885, and being published therein weekly from said day until and including the 12th day of August, A. D. 1885.

It is further stipulated that the name of Timothy Gruaz does not appear in the schedule of liabilities attached to the deed of assignment, nor in the list of those who had claimed to be creditors of said estate filed in the County Court by said assignees, nor was any notice sent to him by said assignees that the claim in controversy, being against the principals in said replevin bond, was first presented to the assignees on the first day of April, 1889, and was first filed in the County Court on the 6th day of August, 1889. It is further stipulated that a writ of *retorno habendo* was duly issued by the clerk of the Circuit Court of Jersey County, Illinois, to the sheriff of Madison county, Illinois, dated March 19, 1889; that the sheriff, under said writ, made a demand on the assignees of Ryhiner & Co. for the return of said property, and that the members of the firm of F. Ryhiner & Co. having left the State of Illinois, no demand was made on them, and that said property has not been returned nor found; that after said property was placed in the possession of F. Ryhiner & Co. by the coroner, under the writ of replevin, as herein stated, the said Ryhiner & Co. leased all of said property to Wm. Ellison & Son, in whose possession it remained from that time until about the 9th day of April, A. D. 1885, when it was destroyed by fire, without the fault or negligence of F. Ryhiner & Co.

That the return on said writ of *retorno habendo* is dated August 23, 1889, and the writ was returned to be filed in the

office of the Jersey County Circuit Court, August 24, 1889. That the value of the property when replevied was \$4,500; that said assignees have not yet settled the estate assigned to them, that they have paid three separate dividends on claims presented within the three months given by the statute, and that if the said claim of Timothy Gruaz shall be decided to be entitled to share in the inventoried assets of said assigned estate, there will be property and assets of said estate sufficient to enable said assignees to pay a dividend on said claim equal to the amount he would have received had his claim been presented within the three months aforesaid, and been duly allowed with other claims so presented, which amount would exceed \$1,100.

KROME & HADLEY,

Attorneys for Assignees.

WISE & DAVIS,

Attorneys for Claimant."

The Circuit Court found the issues for the claimant, and allowed his claim against the defendants, as assignees, for the sum of \$4,000, and rendered judgment therefor and costs, to be paid, in due course of settlement of the bankrupt estate, out of any assets thereof not before distributed to creditors on claims allowed against said assigned estate; and further ordered that defendants pay to plaintiff the same dividend or dividends, or *pro rata* share or shares, on said sum of \$4,000, that has or have been heretofore paid by defendants to creditors on claims allowed as aforesaid, before paying any further dividends to said creditors, and that defendants shall also allow and pay to the plaintiff the same dividend or dividends on his said claim of \$4,000, so allowed, as they shall hereafter pay to other creditors whose claims have been allowed.

From this order and judgment defendants took this appeal.

Messrs. KROME & HADLEY, for appellants.

Messrs. WISE & DAVIS, for appellee.

GREEN, J. Appellants insist the order and judgment of the Circuit Court should be reversed, for two reasons. First-

Because the claim of appellee is barred by section 10 of the assignment act from participating in the assets of said estate until all other claims presented within the time provided, and allowed by the court, have been paid in full. Second. That as the property replevied was destroyed by fire during the pendency of the replevin suit, without the fault of Ryhiner & Co., their estate is not responsible for more than nominal damages.

Section 2 of the assignment act requires assignees to give notice by publication and to send notice by mail to each creditor of whom they may be informed. Section 10 provides that "all creditors who shall not exhibit his, her or their claim within the time of three months from the publication of notice as aforesaid shall not participate in the dividends until after the payment in full of all claims presented within said time and allowed by the court." It is doubtless true that one purpose of this act is to effect a speedy settlement of the bankrupt estate and a dividend of the assets among all the creditors without delay. Another and quite as important purpose of the act is that the assets of the bankrupt estate, so far as they shall reach, will be used to pay the just claims of all the creditors without preference or distinction, so that each creditor will receive an equal proportion thereof in liquidation of his claim. And if it does not appear from the evidence that this case presents equities and that Gruaz had sufficient reason and excuse for delaying the presentation of his claim beyond the period limited by said section 10, the provisions thereof would apply and the claim be barred as contended for. In *Dugger v. Oglesby*, 99 Ill. 45, which was a suit brought against heirs, to recover for the breach of covenants of the ancestor's deed, this court say: "Another objection made to the recovery is that the claim was not filed against the estate of Dugger within the two years after the grant of administration. Letters of administration were taken out in 1869, and the claim now sued on was never filed against the estate. The statute provision is that all demands against an estate not exhibited to the County Court within two years from the granting of letters of administration shall be forever barred, except as to

subsequently discovered estate not inventoried or accounted for by the executor or administrator. All the property, both real and personal, belonging to the estate was inventoried, so that there were no subsequently discovered assets. The eviction did not take place until in 1874. Thus the cause of action did not in fact accrue until long and more than two years after the death of the ancestor and the granting of letters of administration and the settlement of his estate. The cause of action here is not a demand which could have been exhibited to the court, proved or allowed against the estate of Dugger any time within two years after the granting of administration on his estate, it not accruing until afterward. We are of the opinion the limitation of the statute does not apply to the case."

On behalf of appellant it is insisted this case is not in point, because the suit was against heirs, and was not a proceeding directly against the estate on a claim filed in the County Court. But the rule and principle governing the construction to be given the provision, fixing the period within which claims must be presented, is, we apprehend, the same in the case at bar as in the case cited. In the latter case the plaintiff had no cause of action against defendants, except as heirs. Nor has Gruaz any claim against appellants, except as assignees. But the proceeds of the assets of the ancestor's estate in the one case, and the proceeds of the assets of the bankrupt estate in the other, furnish the only fund liable for the payment of the respective demands.

The excuse and reason held to be sufficient to exempt the demand in the Dugger case from the bar there set up under the limitation clause, would seem to be quite as valid and applicable in this case. And in *Suppiger v. Seybt*, 23 Ill. App. Ct. Reps. 468, cited by appellants, this court has said in the comments upon said section 10 of the assignment act: "The reason of this statute is the same as that requiring creditors of deceased persons to exhibit claims within two years after the grant of letters of administration;" and further say in the same opinion: "It may be, cases will arise in which, under the general powers conferred upon the County Court by this act,

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claims not presented within three months can be allowed to have the same effect as if presented within that time. This case presents no equities whatever, shows no wilful neglect on the part of the assignees, offers no excuse whatever for the delay in presenting the claim, except that no notice was mailed." The decision in *Dugger v. Oglesby*, and the quotations from *Suppiger v. Seybt*, are particularly applicable to the facts appearing in this record. *Ryhiner & Co.*, without a shadow of right, sued out a writ of replevin, and under it took from the sheriff all the property levied upon and taken to satisfy an execution in favor of Gruaz, and instead of holding the property to await the final determination of the replevin suit, to be then returned to the officer, if return thereof should be awarded, rented it to others, and while in their possession it was destroyed by fire. Had the property been retained and placed in the hands of the assignees, the whole of it could have been returned to the sheriff in obedience to the writ of *retorno*. The proceeds of the sale of all the property admitted to have been worth \$4,500 would have been applied in satisfaction of the execution, and Gruaz would have been paid his debt, interest and costs. This result was defeated by the failure to return the property to the sheriff, according to the condition of the replevin bond. Not only was appellee thus injured, but without fault or *laches* on his part, the final administration of the replevin suit was delayed for years, and until it was determined his claim was not in a shape to be presented and allowed as a claim against the estate of the bankrupt obligors within the time limited by section 10.

In the face of these facts, appellants insist that the delay so occasioned, whereby an earlier presentation of this claim was prevented, has, by a fair and just construction of the assignment act, deprived appellee of the right to participate equally with the other creditors in the dividends of the bankrupt estate. In view of all the facts proven we can not sustain this contention. Ample and sufficient reason and excuse is shown for not presenting the claim at an earlier period and in this state of case, under the decision and ruling of the cases cited,

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we hold the limitation of section 10 does not apply to said claim.

The destruction by fire of the replevied property while in the possession of the lessees of Ryhiner & Co., who wrongfully sued out the writ of replevin and by virtue thereof procured the possession, did not absolve said firm from liability for the breach of the condition of their bond and failure to make return of the property when return thereof was awarded. And the amount of damages assessed for the breach was warranted by the evidence. Wells on Replevin, sections 455, 600, 601, 602, and authorities thereunder. The order and judgment of the Circuit Court is affirmed.

Judgment affirmed.

36	68
137	91
36	68
59	545

THE CITY OF MT. CARMEL

v.

LOUIS E. HOWELL, ADMINISTRATOR.

Municipal Corporations—Negligence—Personal Injuries—Defective Streets—Proximate Cause—Evidence.

In an action against a city for a death from cerebro-spinal meningitis claimed to have been caused by a blow in the back, received in an accident on a defective street, this court sustains a verdict for plaintiff.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Wabash County; the Hon. C. C. BOGGS, Judge, presiding.

Messrs. BELL & GREEN, for appellant.

Mr. S. Z. LANDES, for appellee.

REEVES, P. J. This was an action on the case in the Circuit Court of Wabash County, brought by appellee as administrator, against the appellant city, to recover damages for the death of

appellee's intestate, alleged to have been occasioned by the negligence of appellant in having a certain street in a dangerous condition, whereby the deceased came to her death. Declaration alleges, in substance, that defendant city permitted a dangerous excavation to remain in Market street, at the intersection of Third street, and that Florence Glick, the plaintiff's intestate, while riding in an express wagon driven by her husband, Samuel Glick, in the exercise of all proper care, was driven into the excavation and thereby injured, of which injury she afterward died; and that she left a husband and children surviving as her next of kin, and claims damages to the amount of \$5,000.

Plea of general issue, not guilty, by defendant city. Trial by jury at November term, 1889, and verdict for plaintiff, assessing damages at the sum of \$2,000. Motion for a new trial by defendant, and motion overruled by the court, and exceptions by defendant.

The errors assigned are as follows: First. The court admitted improper evidence for the plaintiff. Second. The court excluded proper evidence for the defendant. Third. The court gave improper and erroneous instructions for the plaintiff. Fourth. The court erred in overruling defendant's motion for a new trial. Only the third and fourth errors were discussed in appellant's brief and we shall confine ourselves to these and shall take up the fourth first, as that is the order in which they are discussed. Upon this error the case is stated thus by appellant: "The theory of appellee's case is, that an excavation made on the 29th day of September, 1888, in the north half of Third street, at its intersection with Main or Market street, was left open and unguarded; and that the deceased, who was riding in an express wagon, driven by her husband, who was in the exercise of due care, after dark, on the evening of that day, was driven into the open excavation and was thereby injured in the small of her back, of which injury she died on the 14th day of October, 1888. The *onus probandi* in this case was on the plaintiff, to establish by a preponderance of the evidence, three propositions: First, that the defendant city was guilty of negligence in permit-

ting the excavation to remain open and in a dangerous condition; second, that the deceased was driven into the excavation and thereby injured, of which injury she afterward died; and third, that she and her husband were in the exercise of due care at the time of the injury. We have carefully read the evidence from the record. It is not disputed that the excavation complained of was made on the 29th day of September, 1888, but the city claims it was filled up before the time Mrs. Glick was injured. Upon this point there is a sharp conflict in the testimony, and the testimony can not be reconciled. It was the province of the jury in this state of case, to determine to which witnesses they would accord the most credit. In doing this they found for the plaintiff, and we do not feel authorized to disturb their finding. Neither do we find any sufficient reason for setting aside the finding of the jury that Mrs. Glick and her husband were in the exercise of ordinary care at the time of the injury.

The serious question in the case is whether the injury sustained by Mrs. Glick at the time of the accident, was the cause of her death. When the spring wagon in which she was riding was driven into the excavation, she and her husband were thrown forward on the dashboard, and as the wagon went against the horses it frightened them, and they made a spring forward, and this sudden movement forward threw Mrs. Glick back against the seat and hurt her back. At the time she complained that her back was almost broken, and she continued to complain of the severe hurt to her back. She was taken home in the wagon and lingered until the 14th day of October, when she died. It is contended that she died of cerebro-spinal meningitis, and that the injury she received did not produce this disease. The doctors disagreed on this point. Dr. Manley, who attended Mrs. Glick after the injury, says the disease of which she died was spinal meningitis, which, in his judgment, was caused by the injury to her back. Dr. Ross, who was examined as an expert, upon the hypothetical case stated to him, gave it as his opinion that the cause of death was cerebro-spinal meningitis, and that this was not caused by the injury. Dr. Schneck, another medical expert, upon the same hypothetical question gave it as his opinion

that she died from uræmic poisoning. He states that "the injury may have caused a dislocation of her kidneys, and in that way may have caused her death; one kidney would probably do the work for both so far as to sustain life in apparent good condition for a week or nine days, but eventually, from overwork, it would not properly eliminate from the system the matter the kidneys carry away from the blood, and the poison would in time kill the person."

Dr. Tauguary, still another medical expert, upon the same hypothetical question gave it as his opinion that she died of cerebro-spinal meningitis, and that the injury had nothing to do with it. As we understand the position of Dr. Ross, it is that an injury to the back would not produce spinal meningitis unless the injury should directly affect the spinal cord, to the extent of producing inflammation in the cord, and in such case the distinctive symptoms of meningitis would appear within twenty-four hours. Because these symptoms did not appear in Mrs. Glick's case for some eight or nine days after her injury, he concludes that the injury to the back was not the cause of the meningitis. He does not undertake to tell what was the cause in her case; in fact he thinks the cause of spinal meningitis generally is a mystery. He admits that high medical authority asserts that spinal meningitis can be produced by a stroke, by lifting, and wrenching the back, but as he had never seen such a case, he was not inclined to believe this statement. Injury to the spinal column, he says, would not likely produce inflammation of the spinal cord.

There must be inflammation of the spinal cord to produce spinal meningitis. Dr. Schneck stated, in answer to a question whether, upon the facts stated to him in the hypothetical question, it was his judgment that the spinal meningitis which produced her death was caused by the injury to her back: "If her death was from spinal meningitis it was not a direct result of the injury, but I do not believe it was spinal meningitis at all, because an injury serious enough to create inflammation of the spinal covering producing the disease, would produce it within twenty-four hours, as a rule; if it did not occur in twenty-four hours I should consider the chances against it occurring at all." We understand from this that

the spinal meningitis, if it was the cause of her death, was not directly caused by the injury to her back—that is to say, the blow upon the back did not immediately so affect the spinal cord as to set up inflammation therein—because, if it had been the result, the symptoms of spinal meningitis would have shown themselves within twenty-four hours after the injury. But we know that there are tissues about the meninges, and the outer meninges connects itself with the bone of the spinal column, and the blow may have bruised these tissues so that in the tissues there was inflammation, which might result in suppuration, and so the inflammation, after days had elapsed, be communicated to the cord itself, and then the symptoms of spinal meningitis would set in.

This, it is true, is only what might have been, but the fact remains that spinal meningitis did set in manifestly on the 8th day of October, and it came from some cause, and to us it seems much more probable that it resulted from a bruise, by the blow on the back, of some of the tissues surrounding the meninges, than that it came about from some unexplainable cause; while it might not be that, in such a case, it could be said in a medical sense that the spinal meningitis was the direct and immediate result of the blow upon the back, yet, in a legal sense, we think the blow could be said to be the cause of her death. In the discussion of the proximate and remote cause in connection with injuries out of which a cause of action is claimed to arise, many narrow and refined distinctions have been made, but the line that separates a remote and proximate cause may be stated with reasonable precision. The damages to be recovered in an action must always be the natural consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief or injury, the first must be considered as too remote. *Schmidt v. Mitchell*, 84 Ill. 195. If the spinal meningitis which it is claimed caused the death of Mrs. Glick resulted naturally as a consequence from the immediate and direct effect of the blow upon her back, the inflammation of the meninges following, and flowing from the inflammation of the tissues surrounding the meninges, the latter causing the former, then legally

it may be said that the blow upon her back was the cause of the spinal meningitis. The fact one effect succeeds the other and causes the other, does not relieve the cause producing the first effect, from legal responsibility for the second, if it be a natural and consequent one. No new force or power in such a case intervened to produce the final result; the death would not, naturally, have resulted but for the injury. If we can see that death resulted as a natural consequence from the original injury, then the injury was the cause of the death. Even if we concede that this woman died of spinal meningitis, what probable cause is disclosed, other than the injury to her back, of the spinal meningitis? None whatever. Here was a woman between twenty-five and thirty years of age, in good health, but not robust. She received a violent injury to her back on the night of the 29th of September. She suffered intense pain in the small of her back from that time forward. Liniment prescribed by Dr. Ross was applied, also plasters; she continued to grow worse up to October 8th, when Dr. Manley was called. At this time symptoms of spinal meningitis were manifest. No cause other than the injury was suggested for the presence of the spinal meningitis. It did not come without a cause. A cause strongly probable and we think a natural one has been suggested, that traces the spinal meningitis to the injury to her back. If the tissues about the meninges were bruised by the blow, the natural, not necessary but strongly probable, result of such bruise would be inflammation and suppuration, and if that took place, the natural and almost necessary result would be inflammation of the meninges, and consequent spinal meningitis. Again, if the theory of Dr. Schneck be correct, then we think it must be conceded that the woman's death was caused by the injury she received. If the blow upon her back dislocated the kidneys, and the inevitable result of this was uræmic poison that killed the woman, certainly the injury was in a legal sense the cause of her death. We find no just cause of complaint as to the instructions given for appellee. All that were asked by appellant were given.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

JAMES C. MILLER

v.

MARY E. BEST ET AL.

Real Property—Vendor and Vendee—Mental Incapacity—Evidence.

In an action to enforce a lien on land for the purchase money, in which defendant claimed he had made a settlement with his vendor, this court declines to interfere with a finding that the vendor was mentally incapable of making a binding settlement.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Wayne County; the Hon. CARROLL C. BOGGS, Judge, presiding.

On the 16th day of December, 1880, James Miller sold to appellant, James C. Miller, his son, 120 acres of land, situated in Wayne county, for \$1,500. The vendor executed to the vendee a bond for a deed; \$200 was paid when the bond was delivered, and the remaining \$1,300 was to be paid in annual installments of \$200. There is a dispute as to the subsequent payments. Appellant claims he paid in cash \$407, and paid a mortgage on the land of \$334.50. He also claims that James Miller owed him for board from 1880 to 1888. Appellees insist that the money paid on the mortgage was money appellant received from James Miller for the purpose of lifting the mortgage, and that James Miller paid his board in work he did for appellant. In November, 1888, appellant and James Miller had a settlement, as is claimed by appellant, when it was conceded by James Miller that appellant only owed him on the land \$250, and that appellant then paid him \$50 and gave his note for \$200, secured by a mortgage on the land, and thereupon James Miller executed and delivered to appellant a deed for the land.

In October, 1889, appellees were appointed by the County Court of Wayne County, conservators of James Miller, and

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they filed the bill in this cause seeking to enforce a lien for that portion of the purchase money of the land unpaid, alleging that at the alleged settlement and before that time the mind of James Miller was so enfeebled as to render him legally incapable of making a settlement or transacting any business. Upon this question also the evidence was conflicting. The Circuit Court found that James Miller was mentally incompetent at the time of the alleged settlement to transact any business, so that it would be legally binding on him; found the balance due on the sale of the land to be \$415.38; ordered this sum to be paid by appellant to appellees in thirty days, and in default thereof that the land be sold by the master in chancery.

Messrs. HANNA & HANNA and EDWIN BEECHER, for appellant.

Messrs. CREIGHTON & COOPER, for appellees.

REEVES, P. J. The primary question arising in this case is, what was the mental condition of James Miller at the time of the alleged settlement? The complainants introduced upon this branch of the case Mrs. Best, a daughter of James Miller, who testified in substance: "It seems he can not remember anything. He will talk about a thing one day and the next day he can't remember anything about it. He will tell over the same thing two or three times the same day, as though he had never mentioned it before." "Do you say your father's mind was so impaired a year ago that he could not remember?" "He could not remember enough to do any business." Mrs. Karnes, another daughter, testified: "I know he was very forgetful. He would state the same thing over and over again. He would tell the same thing over the next day as though he had never told it before. Father is eighty years old." The old gentleman himself was a witness. He was able to tell about the time he sold the land to appellant. He fixed the price at \$1,600, when the bond for a deed showed it was \$1,500. He could not tell how much was paid him at the

time of the sale. He could not tell how much had been paid him since. He could not tell how much money he had used. He said he had paid for his clothing, had no necessity to spend money for anything else except when he went to Kansas. He remembered going to Ohio soon after the sale was made, but could not tell how much money he took with him. His expenses on this trip he says was simply his railroad fare, and the same as to his trip to Kansas. He says his memory has been failing for several years; had so much trouble that his mind had given way. Then follows his account of making the deed to appellant. "He (appellant) came into the shop where I was making same barrels, and asked me if I was ready to go to Shelton's and fix up that business. I said I could go at any time. I quit work and we went over there, a mile and a half. There was not a word said about our business until we got there. When we got there the children brought a basket of apples; I took up a couple of apples and called for a knife to scrape one. I scraped one on the porch. I did not go in. They went into the office and done up the business. I did not go in with them or do anything until they were ready. They called me to sign the deed. I just sat down and signed it. I did not think there was anything beyond it. I did not think there was anything wrong about that, but he did not pay according to the bond by a good bit. I expected him to do right. I did not need the money, and he did." Shelton, before whom the deed was acknowledged, saw nothing in the old gentleman that led him to suspect that he was not mentally competent to make the deed. James Riggs, T. J. Parnell, Richard Elow, Richard Barker and Reuben Bowman, persons living in the same neighborhood with the old gentleman, testified that in 1888 his mind was all right, so far as they knew, except that one of them said he was quite forgetful. Upon this evidence the Circuit Court found that James Miller was so far mentally incompetent as not to be bound by the alleged settlement of November, 1888. The proof offered by the complainants tended to show such a want of memory on the part of Miller as would illy qualify him to make a settle-

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ment of a transaction extending over a period of eight years and embracing a number of payments. Furthermore it should be borne in mind that the circuit judge who tried this case had the opportunity of seeing the witnesses, hearing them testify, observing their manner, testing their candor, and thus weighing their testimony much more satisfactorily than we can possibly do who have only the written transcript of the testimony before us. He had also before him the man himself, as a witness, in relation to whose mental condition the testimony was given. Under these conditions we do not feel justified in setting aside the finding of the trial court on this question. Under the evidence upon the remaining branch of the case, namely, the amount due from appellant on the sale of the land, we think the court below is abundantly sustained in its finding. The decree of the Circuit Court is therefore affirmed.

Judgment affirmed.

WARREN MAY, ADMINISTRATOR,

v.

HARRISON MAY.

Negotiable Instruments—Gift—Advancement—Notes—Promise to Give—Evidence—Pleading.

1. A gift not expressed or acknowledged in writing can not be deemed an advancement.
2. One claiming personal property as a gift by parol must make reasonably strict proof of the gift.
3. A naked promise to give, without some act to pass the property, is not a gift.
4. The maker of an absolute note can not show, as against the payee, a parol agreement at the time the note was given that it was to be paid conditionally.
5. It is not necessary that the grounds for a motion for a new trial be set forth in writing.

[Opinion filed June 13, 1890.]

VOL. 36.]

May v. May.

IN ERROR to the Circuit Court of Lawrence County; the Hon. WM. C. JONES, Judge, presiding.

This suit was brought to recover the amount due on three notes for \$3,400 each, bearing date August 7, 1885, payable respectively in two, three and four years with six per cent interest, made and delivered by defendant to his father, plaintiff's intestate. The defenses were the general issue, statute of limitations, set-off, payment. Plea, that intestate in his lifetime, on March 1, 1887, in consideration of natural love and affection, released and discharged defendant; and, lastly, a plea averring that at the time of the execution and delivery by defendant to said Jacob May of the notes, and as a material and substantial fact of the consideration for and upon which the defendant executed and delivered said notes, it was then and there expressly agreed by and between said Jacob May and defendant that said Jacob May should hold said notes during his natural life and should only require defendant to pay so much of the money in said notes mentioned, as he, said Jacob, should need for the maintenance of himself and family in his lifetime, and that at his death said notes were to be discharged and satisfied by the terms of said agreement without any further payment by defendant. Replications were interposed to the several pleas.

The jury found the issues for defendant. Plaintiff's motion for a new trial was overruled. Court entered judgment on the verdict and plaintiff brings up the record for review and asks that said judgment be reversed by this court.

The evidence introduced for defendant was substantially as follows: William May, brother of defendant, testified that the debt or claim for which notes were given, arose between the father and defendant for a stock of goods at Norris City. The date of that transaction was about 1871. "Do not know as to the amount of the original notes first given, but it was for Norris City stock of goods, and these new notes were given for that and interest. These notes were to be paid in full or to be paid if father called for them in his lifetime, otherwise they were not to be paid. This is what father told

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me. Last heard him speak about that the last of August or first of September, 1885. He said he wanted the matter to stand as it was unless he called for the money in his lifetime. He told me they were not to be paid unless he called for the money in his lifetime."

Marion May, brother of defendant, testified: "Do not know, absolutely, the consideration for which the notes were given—think for the Norris City stock of goods. This is renewal of old claim. Don't know that I have personal knowledge from what father said or did as to agreement between him and Harry about the payment of these notes, but my understanding is that they were payable during his lifetime; that if he did not call for them during his lifetime they are not to be paid; but I don't pretend to state that he told me that directly. I gathered that from his conversation. Understood these notes were given in renewal of the old notes given for the Norris City stock of goods. We all had a settlement in August, 1885. I gave him my notes about the same time." This question was then asked: "You had the same understanding?" Ans. "Yes, sir. I felt, though he did not tell us so, but I felt that is the way of it. Father gave it as an advance to his children; he gave me money and took my notes, and I think he did so with the rest. I think when he took the notes he intended that as a gift to Harry. I gather that understanding more from father's general course of dealing with all of us, and with Harry especially. I don't know that he especially mentioned those particular notes. My understanding was they were not to be paid unless, from some unfortunate cause, father should want them."

Warren May, plaintiff, and brother of defendant, testified: "Understand these notes were given as renewal notes for Norris City stock of goods. My understanding is that when the old gentleman came to settle for the stock of goods, Harry gave him his notes for the stock. It was a stock of goods that he took to sell out at Norris City." Question: "That was intended rather as a gift to Harry?" Ans. "That is the way we always understood it. I could tell better by what he done with the others." Question. "Tell the jury what

you understood about those notes." Ans. "My understanding was these notes were not to be paid. I had given notes and he told me that they were mine, not to be paid unless he called for them in his lifetime, and he said the other boys were to be the same. In talking to me he told me what he intended to do with me, and said the other boys should be the same. He said my notes were not to be paid unless he needed them in his lifetime." He did not need the money in his lifetime.

Mr. J. C. ALLEN, for plaintiff in error.

Mr. E. CALLAHAN, for defendant in error.

GREEN, J. We have reproduced in the foregoing statement all the material evidence introduced on behalf of defendant, and it will be at once apparent that it fails to sustain either of the defenses set up. It appears the notes sued on were made and delivered by defendant to plaintiff's intestate for a valuable consideration. Also that the suit was not barred by the statute of limitations pleaded. And there is no evidence of the payment of the whole or any part of the said notes. It can not be claimed the release of the defendant from the payment of the notes or stock of goods was given as an advancement, even if the evidence proved such release. All the essential elements to constitute an advancement under the statute are lacking. "No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant." 1 Starr & Curtis' Stat., par. 7, p. 883; *Wilkinson v. Thomas et al.*, 128 Ill. 363.

Nor does the evidence establish a gift by the father to the son of the stock of goods, or of the debt evidenced by the notes sued on. The goods were sold, not given, to the son, and were delivered to the son as a purchaser and his notes taken in payment, and the notes sued on were retained by the intestate and were never delivered to the defendant. Giving

the evidence the most favorable construction for defendant, only an *intention* to give can be said to be proven, and much of the evidence that tends to prove this was incompetent, consisting of the conclusion and understanding of the witnesses, and is quite unsatisfactory. One claiming personal property as a gift by parol, ought to be held to make reasonably strict proof of the gift. *Boudreau v. Boudreau*, 45 Ill. 480. A parol gift of a chattel is incomplete without a delivery or something equivalent to delivery. Without such delivery no title passes. The donor must part with the possession and dominion of the property. The mere expression of an intention to give, or a naked promise to give, without some act to pass the property, is not a gift. *People v. Johnson*, 14 Ill. 341, and cases there cited; *Blanchard v. Williamson*, 70 Ill. 647; *Fanning v. Russell*, 94 Ill. 386; *Williams v. Forbes*, 114 Ill. 167.

There remain but the defenses in the two pleas last pleaded to be examined. No evidence supports the plea averring that the intestate in his lifetime, on March 1, 1887, in consideration of natural love and affection released and discharged defendant, even if the averments constituted a legal defense. The last plea also is not proven. It does not appear that at the time the notes were given there was an agreement, as averred, between the parties that the notes were not to be paid. But the plea itself is bad. To support it evidence would be required showing that by an oral contemporaneous agreement the notes, which were absolute promises to pay, were to be payable only on contingency. This can not be permitted. The maker of an absolute note can not show, against the payee, that by a parol agreement, made between the parties at the time such note was made and delivered, the note was to be paid only upon a certain condition not expressed in the instrument. *Walker v. Crawford*, 56 Ill. 444. A plea objectionable for like reasons as the one we are considering, is thus commented upon by our Supreme Court: "The plea, in substance, amounts to this—that it was verbally agreed, at and before the time the notes were executed, by the defendant and payee, that the defendant should not be required to

pay the note. In considering this question the inflexible rule of law is that the terms of a written contract can not be varied by parol evidence. Where a contract has been reduced to writing, the prior and contemporaneous verbal agreements of the contracting parties are merged in the written instrument, and resort can only be had to the instrument itself to determine the terms and conditions of the contract, and the liability of the parties." *Weaver et al. v. Fries*, 85 Ill. 356. The motion for a new trial should have been sustained, and the verdict set aside. It appears by the bill of exceptions such motion was made, and exception taken to the overruling thereof, and although it does not appear the grounds for such motion were set forth in writing, yet, on the authority of *O. O. & F. R. R. Co. v. McMath*, 91 Ill. 104, this was not necessary. But, we will add, this suit seems to have been commenced by a declaration, filed July 12, 1889, and to the August term, commencing August 6th. The note due in four years had not then matured, and no action to recover thereon would then lie. The appearance of defendant and waiver of process did not give such right with respect to this note. Also, if the declaration is correctly set forth in the transcript, two notes for \$3,400, each payable in *two* years, and a third note payable in *three* years for same amount, are sued upon, instead of notes maturing in two, three and *four* years, corresponding with the notes read in evidence. When the cause is redocketed, counsel for plaintiff can amend the declaration, and dismiss as to the note due in four years. The judgment is reversed and cause remanded.

Reversed and remanded.

THE WABASH RAILWAY COMPANY

v.

WILLIAM MCKITTRICK, ADMINISTRATOR.

Railroads—Negligence—Personal Injuries—Ownership of Road—Misnomer.

Wabash Ry. Co. v. McKittrick.

In an action against the "Wabash Railway Co." for a wrongful death, the evidence showing that the road on which the injury was received was owned by the "Wabash, St. Louis & Pacific Railroad Co.," and the train which caused the injury was operated by its receiver, it is *held* that plaintiff can not recover.

[Opinion filed June 13, 1890.]

IN ERROR to the Circuit Court of Madison County; the Hon. AMOS WATTS, Judge, presiding.

Mr. GEORGE B. BURNETT, for plaintiff in error.

Mr. A. W. METCALFE, for defendant in error.

REEVES, P. J. This action was to recover for the death of defendant in error's intestate, caused by being struck by a train of plaintiff in error upon the railroad of plaintiff in error. The suit is against the Wabash Railway Company, a corporation organized under the laws of this State. The plea was not guilty. The proof clearly shows that the railroad upon which the injury to defendant in error's intestate was received was owned by the Wabash, St. Louis and Pacific Railroad Company, and the train causing the injury was operated by John McNulta, receiver of the Wabash, St. Louis and Pacific Railroad Company. The declaration averred that plaintiff in error was a corporation duly organized, and the plea admitted this averment, but the evidence clearly shows that the Wabash Railway Company—conceding there is such a corporation, as we must do under the pleadings—did not own the railroad upon which the injury complained of was received, and that it was not operating the train which caused the injury. In this condition of the case we do not see how the judgment of the Circuit Court can be sustained. The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

WILLIAM B. CULLEY ET AL.

v.

WILLIAM MOHLENBROCK.

Administration—Right of Creditor to be Appointed Administrator.

The heirs at law may, by tendering the amount of his claim, deprive a creditor of his statutory right to be appointed administrator.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Jackson County; the Hon. O. A. HARKER, Judge, presiding.

Mr. J. B. MAYHAM, for appellants.

Messrs. SMITH, McELVAIN & HERBERT, for appellee.

REEVES, P. J. Lydia Culley died intestate April 24, 1889, leaving appellants, her children and heirs at law. At the time of her death her property was in the hands of a conservator appointed by the County Court of Jackson County, she having been adjudged a distracted person. On the 18th day of May, 1889, David P. Culley, son and heir at law of the deceased, filed in the County Court a petition and information setting forth the adjudication by the County Court that said Lydia Culley was distracted, the appointment of a conservator, and her death, naming her heirs at law; that there were no debts or claims against her estate except such as the conservator could properly pay; that as one of the heirs and at the request of the others, he asked that upon the settlement of the conservatorship, the conservator be ordered to distribute the estate among the heirs of said Lydia Culley, according to their respective rights, thereby saving the costs of administration. No action was taken by the court upon this petition except to continue the same. On the 3d day of July, 1889, appellee, claiming to be a creditor of Lydia

Culley v. Mohlenbrock.

Culley filed his petition in the County Court, asking that he be appointed administrator of her estate, and filed with his petition, his account against the estate for \$18 verified by his oath. This petition came up for action thereon in the County Court on the 6th day of August, 1889, when the heirs presented a counter petition, asking the court not to appoint appellee administrator, but that the conservator be permitted to settle up the estate and if that could not be done, that Dudenbostel, the conservator, be appointed administrator.

It appears that on the 5th day of August, 1889, one of the heirs tendered to appellee the amount of his claim against the estate, but appellee declined to receive it, and the next day at the hearing before the County Court, the attorney for the heirs tendered \$18 to appellee, and deposited the same with the clerk for him. Thereupon the County Court denied the petition of appellee and refused his application to be appointed administrator, and appointed Dudenbostel. An appeal was taken to the Circuit Court, where the action of the County Court was reversed, and from the judgment of the Circuit Court this appeal is brought.

The only question which we have thought it necessary to consider in the case is, whether the right, whatever it may be held to be, of appellee, to be appointed administrator of the estate of Lydia Culley, was extinguished by the tender to him of the amount of his claim. Even if the offer to pay him on the 5th day of August was not a good tender, there can be no question as to the tender made on the next day. The only conceivable reason for giving a creditor the right to administer upon the estate of a deceased person over persons generally, is that he has an interest in the estate to the extent of his claim.

When those to whom the estate would go, under the law, offer to pay the claim and tender the same, all reason for giving the creditor a preference in the appointment as administrator ceases. His being a creditor does not give him such a preferential right that it may not be divested by the payment of his claim by those to whom the property of the estate belongs, subject to the payment of the debts of the estate.

Let us suppose a large intestate estate. The heirs know of no debts. They desire to avoid the expense of administration and can, by agreement among themselves, arrange as to the distribution of the property. Under these conditions, there is no application for letters of administration until the sixty days have elapsed. Then some one comes forward with a small claim of a few dollars and applies for letters. Can it be true that the heirs can not pay the claim and defeat the application, but that letters must necessarily be granted to the creditor who holds such a claim, and the heirs thereby be subjected to the payment of commissions upon the whole estate? We think not. Such a rule would work manifest injustice. We have no doubt the Probate Court has the power in such a case to deny the application of the creditor to be appointed administrator. It is said the tender did not include the costs. It must be remembered that the hearing was upon the application of appellee for his own appointment and upon the application of the heirs for the appointment of Dudenbostel. The court decided the controversy by appointing Dudenbostel. No costs were adjudged against appellee, and whatever costs were made became chargeable against the estate. The County Court decided correctly, and the judgment of the Circuit Court should have affirmed the action of the County Court. The judgment of the Circuit Court is reversed and the cause remanded to the Circuit Court, with directions to affirm the action of the County Court. *Reversed and remanded.*

THE HARRISON MACHINE WORKS

v.

NICHOLAS J. MILLER.

Sales—Delivery—Breach of Condition.

Where goods are delivered without the seller's authority, and the buyer fails to give his notes in payment, which was a condition precedent to the sale, the seller may retake possession.

[Opinion filed June 13, 1890.]

Harrison Machine Works v. Miller.

APPEAL from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Mr. R. W. S. WHEATLEY, for appellant.

Mr. B. W. POPE, for appellee.

GREEN, J. This suit in trespass was brought by Miller against appellant to recover damages for the taking of a "Jumbo Traction Engine," alleged to be the property of plaintiff, and was a part of the same "threshing outfit" mentioned and described in the statement and opinion in Harrison Machine Works v. Miller, 29 Ill. App. 567. In essential particulars the facts in that case are the same as in this, and a full statement of the transaction out of which the litigation in each case arose, and of all other material facts appears in that report; we deem it unnecessary to go over the same ground in this opinion. Briefly stated, the facts are that Miller wished to buy the outfit entirely on credit. Appellant was willing to sell it on credit, but upon condition only, and as a condition precedent to the completion of the sale and delivery of the property to Miller, that he should first secure the purchase money by his notes, and a mortgage upon certain described property. Miller acceded to these terms, agreed to give the required security, but failed and refused to do so. By his default the sale, was never completed and Miller acquired no right or title to the property or to the possession thereof. The appellant offered to place him in *statu quo*; elected to rescind the sale, and took the property into its own possession, as it lawfully might. The pretended delivery of the property to Miller by Bischof under which he claims, if in fact there was a delivery, was wholly unauthorized by appellant and Miller knew that fact. The evidence fails to show an unlawful taking by appellant of property belonging to Miller, and hence the verdict of the jury finding defendant guilty was not warranted by the evidence. The Circuit Court erred in overruling defendant's motion for a new trial and rendering judgment on the verdict for plaintiff. The judgment is reversed and cause remanded.

Reversed and remanded.

WILLIAM R. JACKSON

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Intoxicating Liquors—Unlawful Sale—Original Package—Jury—
Officer in Charge Must be Sworn.*

1. Sec. 1, Chap. 43, Laws 1887 (Starr & Curtis, 237), prohibits the sale of intoxicating liquors outside of the incorporated limits of any city, town, or village, except in original packages, and such packages must contain five gallons or more.

2. The requirement of the statute, that the officer placed in charge of the jury when they retire to make up their verdict must be sworn, can not be dispensed with even in misdemeanors, except by an agreement, noted upon the minutes of the court.

[Opinion filed June 13, 1890.]

IN ERROR to the County Court of Wayne County; the
HON. E. C. KRAMER, Judge, presiding.

MESSRS. R. P. HANNA, C. O. ELLIS and CREIGHTON &
COOPER, for plaintiff in error.

MR. F. B. HANNA, State's Attorney, for defendants in error.

REEVES, P. J. Plaintiff in error was indicted for selling intoxicating liquor in less quantity than five gallons outside the corporate limits of any city, town or village. The language of the statute is: "Whoever shall, outside of the incorporated limits of any city, town or village, by himself or another, either as principal, clerk or servant, directly or indirectly, sell, barter or exchange, or in any manner dispose of, for money or anything of value, any intoxicating liquor of any kind in any less quantity than five gallons, and in the original package as put up by the manufacturer, shall for each offense be fined," etc. Sec. 1, Chap. 43, Laws 1887 (3. Starr & C. Ill. Stats., 237). Only two reasonable constructions can, our judgment, be placed upon this statute. First, that the sale in less quantity than five gallons, unless in the original package, is prohibited. Second, that the sale of intoxicating

36	88
52	514
36	88
156	243

Jackson v. The People.

liquors outside incorporated cities, towns and villages is prohibited except in the original package as put up by the manufacturer, and these packages must contain five gallons or more. This latter construction, as it seems to us, is the more accurate, in view of the language used. Such sale, if not prohibited, is, by inference, permissible. What is not prohibited by this statute is, as to quantity, five gallons or more, and, as to condition, "in the original package as put up by the manufacturer." To say that a sale of less than five gallons is not prohibited unless in the original package as put up by the manufacturer, would permit the sale in any quantity if not in the original package. To say that the sale of less than five gallons, if in the original package, is not prohibited, would give a broader permission to sell than the general law, which prohibits the sale in less quantity than one gallon. If original packages of one pint or one quart could be sold under this statute, the prohibition would be less broad than the gallon statute. The object of the Legislature was evidently to enlarge the prohibition of the sale outside of cities, towns and villages. Hence, as we interpret this statute, it inhibits the sale except in original packages, and such packages must contain five gallons or more.

The officer who was placed in charge of the jury when they retired to make up their verdict, was not sworn as the statute requires. This requirement of the statute can not be dispensed with, even in misdemeanors, except by an agreement noted upon the minutes of the court. See Sec. 495, Chap. 38, Starr & C. Stats. Ill., 866. If it be shown that no injurious results of this omission followed to the defendant, this will not cure the error. It was no part of the duty of the defendant to see that the officer was sworn, or to object to his taking charge of the jury until he was sworn. It was the duty of the people to see that this was done, or that it was waived by an agreement entered on the minutes of the court. The provision of the statute is clear, explicit and peremptory, and, until modified or repealed, its requirement can not be dispensed with. *McIntyre v. People*, 38 Ill. 514; *Lewis v. People*, 44 Ill. 452.

The judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

BENJAMIN F. TRAINER ET AL.

v.

WILLIAM LAWRENCE.

36	90
52	503
36	90
59	655
36	90
189	69

Highways—Eminent Domain—Proceedings of Commissioners—Certiorari.

1. *Certiorari* is the proper remedy to review the proceedings of the commissioners of highways in establishing a road.

2. Before damages can be assessed for land taken for a public highway, the survey of the proposed road must be filed as required by Sec. 36, Chap. 121, R. S.

3. The certificate of the commissioners required by Sec. 41, Chap. 121, R. S., to be presented to a justice of the peace within ten days from the granting of a petition to establish a public highway, must be so presented or the commissioners can not proceed.

[Opinion filed June 13, 1890.]

IN ERROR to the Circuit Court of Jasper County; the Hon. WILLIAM C. JONES, Judge, presiding.

Messrs. GIBSON & JOHNSON, for plaintiffs in error.

Messrs. FITHIAN & JACK, for defendant in error.

GREEN, J. The petition for *certiorari* in this case alleged that the proceedings of plaintiffs in error, commissioners of highways of the townships of Fox and Smallwood, establishing a public road on the line between said towns, are illegal and void because the commissioners did not, within ten days from the date of the meeting at which they decided to grant the prayer of the petition for said road, file the certificate and ask for a jury to assess the damages, as required by Sec. 41, Chap. 121, Rev. Stat., and because the survey of the proposed road, as required by Sec. 36, same act, was not made until after the damages had been assessed by the jury. By the record of the said proceedings of the commissioners, in

the return to the writ, it appears they met and decided to grant the prayer of the petition for the road on July 21, 1888, but did not present the certificate required by Sec. 41 to the justice of the peace, until August 17, 1888. It further appears by the same record that the jury which assessed the damages returned their verdict on September 19, 1888, assessing the damages to defendant in error as owner of the land upon which the road was to be established, at \$156, and not until September 25, 1888, did said commissioners cause a survey and plat of the road to be made as required by said Sec. 36. But counsel for plaintiffs in error, conceding that the commissioners did not obey the requirements of Sec. 36 and 41 in the respects above mentioned, contend that such omission of duty did not render their proceedings and order establishing said road illegal and void, because said sections are directory merely and not mandatory. And further contend that if defendant in error felt aggrieved, his proper remedy was an appeal to three supervisors, as provided in Sec. 59, Chap. 121.

We are of the opinion defendant in error invoked the aid of the best and most proper remedy to prevent the threatened wrong. He alleges his private property is about to be taken for public use by virtue of certain proceedings which are illegal and void. By the aid of the common law writ of *certiorari*, the record of those proceedings is brought before the court and is inspected; if, upon such inspection, the court finds the proceedings to be illegal and void, the same are quashed as prayed for, and thus by a summary, effectual and inexpensive proceeding, the petitioner is protected in the enjoyment of his legal rights, and the threatened injury is prevented,

Nor can we adopt the views expressed by counsel for plaintiffs in error, touching the character and construction to be given said sections 36 and 41. We hold the making of the survey and plat of the road, as required by Sec. 36, to be a preliminary act necessary to be performed before the damages to the land owner can be lawfully assessed and fixed by a jury, and it is the purpose of the law that the jury should have the survey and plat of the road, and thus be furnished with neces-

sary and accurate information of its exact location, so that when they go upon and examine the land to be taken for the road, they can intelligently and fairly determine and assess the damages. We are supported in this bidding by the Supreme Court in Pool et al. v. Breese, 114 Ill. 594. In that case, among other acts complained of, and held to be illegal, was that "said commissioners did not, before proceeding to ascertain and assess damages, cause a survey and plat of said road to be made, giving the courses and distances, and specifying the land over which it should be laid out, but assessed the damages without such survey."

We are also of the opinion that, as a necessary precedent to the taking of the land of defendant in error for public use, by establishing a public road upon it, the commissioners *within ten days* from July 21, 1888, should have presented to the justice of the peace the certificate as required by Sec. 41, and failing to do so within the time prescribed, they lost their jurisdiction and could not legally proceed further in the matter of establishing the road in question. As the court say in Hyslop et al. v. Finch, 99 Ill. 171, "Whenever, in pursuance of law, the property of an individual is to be disturbed by proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection. These provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance. See, also, Comm'rs of Highways v. Harper, 38 Ill. 103; Wood v. Comm'rs of Highways, 62 Ill. 391; Pool et al. v. Breese, *supra*. It follows, then, from what is above said by us, that in our judgment the record of the proceedings of said plaintiffs in error should be quashed; but inasmuch as the court below quashed the same in part only, we reverse its order and judgment and remand the cause with directions to the Circuit Court to quash the entire proceedings of said commissioners of highways, plaintiffs in error.

Reversed and remanded with directions.

ALBERT TREFFERT, ADMINISTRATOR,

V.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

Railroads—Negligence—Personal Injuries—Practice—Special Findings—Damages.

1. In an action against a railroad company for a wrongful death, a special finding that deceased did not exercise any precaution to protect herself from danger, is not such a finding of fact as will justify the court in entering judgment for defendant.

2. The amount of damages to be awarded in such an action must be left to the discretion of the jury.

[Opinion filed June 13, 1890.]

IN ERROR to the Circuit Court of Clinton County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Plaintiff in error as administrator, brought this action against the railway company to recover damages for causing the death of his intestate, who was killed by defendant's train striking the vehicle in which deceased was riding, at a public highway crossing. The negligence charged is running the train at a dangerous rate of speed, and not managing and controlling it with care and caution; failing to give the warning signals, or either of them, as required by the statute, and failing to erect and maintain a warning board at said crossing. The jury returned a general verdict for plaintiff, assessing \$500 damages, and also special findings upon questions submitted on behalf of defendant. Whereupon counsel for plaintiff entered a motion to set aside the general verdict and for a new trial, and on behalf of defendant a cross-motion was entered for judgment in favor of defendant on the special findings of the jury. The court overruled plaintiff's motion, sustained that of defendant and rendered judgment upon the special findings against plaintiff for costs. This writ of error sued out by plaintiff brings up the record for review, and on

his behalf we are asked to reverse the judgment of the Circuit Court, remand the cause with directions to set aside the general verdict, and award a new trial.

Messrs. B. D. LEE and M. P. MURRAY, for plaintiff in error

Messrs. POLLARD & WERNER, for defendant in error.

GREEN, J. There are but two questions of importance presented for our decision. First: Did the court err in rendering judgment against plaintiff upon the special findings of the jury. Second: If it did, ought this court reverse and remand with directions to set aside the general verdict and award a new trial. To sustain the judgment, defendant relies upon the special finding of the jury in their answer to the following question: "What, if any, precautions, did the deceased, Mary Treffert, take or observe to guard against and protect herself from danger from a crossing train, in approaching and driving upon the track of defendant at the time of the alleged killing?" Answer: "None." It is claimed this answer is equivalent to finding that deceased did not exercise due care. For due care means *some* degree of care and the jury find deceased exercised none; hence the finding was inconsistent with the general verdict and the plaintiff's right to recover, and justified the court in rendering said judgment.

An examination of the statute and the construction given it by our Supreme Court will be necessary to furnish us a proper guide in deciding whether this contention of defendant is correct or not. The statute is as follows:

"Sec. 1. That in all trials by jury in civil proceedings in this State in courts of record, the jury may render, in their discretion, either a general or a special verdict. And in any case in which they render a general verdict they may be required by the court and must be so required on request of any party to the action, to find specially upon any material question or questions of facts which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party, before the commencement of the argument to the jury.

“Sec. 2. Submitting or refusing to submit a question of fact to the jury when requested by a party, as provided by the first section hereof, may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law

“Sec. 3. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter, and the court may render judgment accordingly.”

In the opinion in *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, the Supreme Court have said, in giving construction to the statute, the first, and perhaps the most important question relates to the scope and meaning of the phrase, “material question or questions of fact.” May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties depend? Evidently, it would be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render. Doubtless a probative fact, from which the ultimate fact *necessarily* results, would be material, for there the court could infer such ultimate fact as a matter of law. But when the probative fact is merely *prima facie* evidence of the fact to be proved, the proper deductions to be drawn from the probative fact presents a question of fact and not of law, requiring further action by the jury, and it can not, therefore, be made the basis of any action by the court.

A fact which merely *tends* to prove a fact in issue without actually proving it, can not be said to be in any legal sense inconsistent with a general verdict, whatever that verdict may be. Tested by the rule thus announced, the question asked was not a proper one to be submitted, and the finding was not inconsistent with the general verdict. This was the ultimate fact in issue: Was the deceased *exercising reasonable care* for her own safety in approaching and driving upon the track of defendant at the time she was injured? The question ignores the ultimate fact and presents a mere probative fact.

From the evidence the jury might well have found that

the train approached the crossing rapidly without giving the warning required by the statute; that the deceased, presuming persons in charge of a train would do their duty, and hearing no sound of bell or whistle, felt secure and took no precaution to protect herself from danger, because, by the negligence of those in charge of the train, she received no warning of approaching danger until all or any precaution would have been unavailing; and yet have found, by their general verdict, without inconsistency, she was not guilty of want of reasonable care, all the other facts and circumstances proven being taken into consideration. Our Supreme Court have said: "Where a traveler approaches a crossing and no signal has been given, the necessary conclusion in his mind is that no train is near, and he is not so careful or watchful as if the required signal had been made. Notwithstanding the neglect of the company the traveler must exercise caution and prudence, but his care would necessarily be less when he had no warning of danger, and an injury to him under such circumstances must naturally be attributed in a great degree to the negligence of the company. *C. & A. R. R. Co. v. Elmore*, 67 Ill. 176; *C., B. & Q. R. R. Co. v. Triplett*, 36 Ill. 483. In our opinion the special finding could not legally be made the basis of any action by the court, and it was error to enter a judgment thereon against the plaintiff.

With reference to the second question little need be said. The reasons given for setting aside the verdict are, that it was a compromise verdict for too small an amount of damages, and such compromise was forced upon the jury by the instructions of the court. It is said this conclusion is to be inferred from the fact that upon a former trial of this cause a jury awarded \$5,000 damages. We do not find the reasons given are supported by the record nor conclude that because one jury awarded a large amount of damages, and another a small amount, that the latter was too low or the former too high. As has often been said by the Supreme Court and by this court in cases of this kind, the amount of damages to be awarded is left to the discretion of the jury and must be determined by the jury. Unless we can see they have been

O. & M. Ry. Co. v. Cope.

governed by improper motives, or their verdict is the offspring of prejudice or passion, we ought not interfere.

In this case we can not say the jury have not fairly and honestly performed their duty, nor can we say they have improvidently exercised the discretion given them.

We therefore decline to set aside the verdict, but reverse the judgment of the Circuit Court and remand the cause, with directions to that court to enter judgment for the plaintiff on the verdict of the jury for the damages assessed and costs of suit.

Reversed and remanded with directions.

OHIO AND MISSISSIPPI RAILWAY COMPANY

v.

RUFUS COPE.

36 97
94 *466

Railroads—Expulsion from Train—Defective Ticket—Bill of Exceptions.

1. A railroad company can not refuse to accept a defective ticket for passage, where the defect is due to the carelessness of its agents.

2. The bill of exceptions must show that it contains all the evidence heard on the trial.

[Opinion filed June 13, 1890.]

APPEAL from the Circuit Court of Clay County; the Hon. C. S. CONGER, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

Mr. RUFUS COPE, *pro se*.

REEVES, P. J. Upon examination of the record we find that the bill of exceptions copied into the record does not show that it contains all the evidence that was heard by the court. In this condition of the record we are precluded from examining all of the questions raised by the assignment of errors.

Objection was interposed to the appellee's testimony in relation to his purchase of his ticket and the way it was made up. The ticket-seller was the agent of appellant in the sale of the ticket, and we fail to see any valid objection to the competency of this testimony. It is claimed that the condition of the ticket when presented to the conductor, for appellee's transportation from St. Louis to Flora, was such that it did not entitle him to ride upon it. It was a coupon ticket from Butler City, Montana, to Flora, Illinois, over, as nearly as we can tell from the evidence, the Union Pacific Railway from Butler City to Kansas City, over the Wabash from Kansas City to St. Louis, and over the O. & M. Ry. from St. Louis to Flora. It was shown that some of the coupons were pasted on, and it is claimed that in tearing off the coupon from Kansas City to St. Louis, the lower margin of the coupon from St. Louis to Flora, on which was printed the check number by which to check against the road which sold the ticket, was torn off, and because this was gone, it is claimed the ticket did not entitle appellee to ride upon it. The original ticket is not before us, but what purports to be an exact copy is contained in the record.

The head of the ticket reads, "Union Pacific Railway. Good for one passage of class indicated to point on Ohio and Mississippi Ry. between punch marks." The coupon reads, "Issued by Union Pacific Ry. Ohio and Mississippi Railway. St. Louis to point between punch marks, via O. & M. Below is printed the names of stations on appellant's road, of which Flora is one. The copy does not show punch marks on either side of the word Flora, but it is conceded the original ticket did. It was not the fault of appellee that the check number was torn off. The check number was put on the lower margin of the ticket for the convenience of the appellant. It formed no part of the contract of carriage from St. Louis to Flora. The manner in which the ticket was made up by pasting the coupons on the general ticket was explained to the conductor and if the marginal number had been torn off it was either the fault of appellant's agent in making up the ticket, or of the Wabash conductor in removing the coupon next below this one.

Esterly Harvesting Co. v. Hill.

This is not a case of the sale of an incorrect ticket over one road where the purchaser supposed he was getting a ticket over another, for this ticket was a correct ticket; it contained all that was necessary to entitle appellee to ride on appellant's train from St. Louis to Flora, and if in making up the ticket the General Passenger Agent's Association chose to place this check number upon a part of the ticket where it was liable to be torn off by conductors in detaching the coupons, instead of placing such check number upon a part of the ticket where it could not be removed without destroying the contract expressed in the ticket, the railway company should not be heard to say that the removal of the check number destroyed the validity of the ticket. Moreover, in the copy of the ticket found in the record, the check number is printed on the general ticket, so that the only reason given why this ticket should be held invalid, namely, that the check number was gone, so appellant could not tell to what road to charge up the ticket, fails. Again, the general ticket, and the coupon as well, shows that they were issued by the Union Pacific Railway Company. These views dispose of the criticism upon the instructions. The claim that the damages were excessive we can not consider in the condition we find the bill of exceptions.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ESTERLY HARVESTING COMPANY

v.

GREEN E. HILL.

Sales—Verbal Lien—Notice—Witness.

1. The purchaser of property on which there is a verbal lien, without notice of the lien, is not affected thereby.

2. The death of a person can not affect the competency of a witness in a suit against his personal representative individually.

[Opinion filed June 13, 1890.]

APPEAL from the County Court of Clinton County; the Hon. JESSE JONES, Judge, presiding.

Appellant, on the 1st day of July, 1887, sold to Thomas Pritchett, a twine binding harvester.

Appellant took from Pritchett at time of sale, three notes: one for \$50, due October 1, 1887; one for \$50, due October 1, 1888, and one for \$42, due October 1, 1889. All the notes were guaranteed by J. A. Skipper. When the first note fell due, Pritchett was not ready to pay it. He was asked to give a chattel mortgage to secure the notes. This he declined to do, but agreed to give a lien on the machine, and that the "machine should stand good for the notestill paid." Pritchett died October 4, 1888, and appellee was appointed his administrator. As such administrator, Hill inventoried the machine, the same was appraised and sold at the administrator's sale, to one Davis, for \$50. The sale was reported to and approved by the County Court, and the administrator charged with the \$50. Davis afterward sold the machine to appellee at the price which he bid at the sale.

The machine was stored in a shed on the Pritchett farm at the time of the sale. After appellee bought the machine of Davis, he arranged with the party in possession of the Pritchett farm for the machine to remain where it was at time of administrator's sale.

Appellant claims that the machine was in fact sold by the administrator to himself and therefore the sale was void. On the 11th day of June, 1889, appellant replevied the machine from appellee in a justice's court. From the judgment in the justice's court an appeal was taken to the County Court and from the judgment in that court this appeal is prosecuted.

Messrs. CASEY & DWIGHT, for appellant.

Mr. M. P. MURRAY, for appellee.

REEVES, P. J. On the trial in the County Court objection was made by the defendant to the competency of the wit-

ness J. A. Skipper, the guarantor upon the notes by whom it was proven that Pritchett in his lifetime agreed that the machine should stand as security for the notes, until paid. The defendant is not made a party to the suit as administrator of Pritchett. He did not defend in this capacity. The estate of Pritchett had no interest in the result of the suit. The estate had received the proceeds of the sale of the machine by the administrator. As against the defendant, Skipper was a competent witness.

Did the appellant have such a lien on the machine as would enable it to maintain replevin? It must be remembered that this was not a conditional sale. The sale of the machine to Pritchett was an absolute sale. The agreement for a lien was made some months after. It was not made so as to conform to the provision of the statute. But it is contended that the agreement was binding upon Pritchett and his legal representatives. Even if this be conceded, this is not a suit against Pritchett, or his legal representatives. If the sale of the machine at the administrator's sale was not legal, and the possessory title is still to be considered in Pritchett's administrator, and this suit is to be treated as against the estate of Pritchett, then, plainly, Skipper was not a competent witness, and without his testimony, appellant showed no right to the machine. In any view of the case, we do not see how appellant could recover in this action. If Hill had any right of possession of the machine as purchaser from Davis, he could not be affected by the verbal lien set up by appellant, as it is not claimed that he had any notice of the lien. If the machine, in law, belonged to the estate of Pritchett, subject to the lien, then Skipper was not a competent witness to prove the verbal lien. The judgment of the County Court is affirmed.

Judgment affirmed.

RALPH E. SPRIGG

V.

CAROLINE GRANNEMAN, ADMINISTRATRIX.

Negotiable Instruments—Note—Set-off—Conditional Purchase of Claims—Evidence.

1. The set-off of a note assigned conditionally for the purpose of using it as a set-off, with an agreement to return it to the assignor if not so used, will not be allowed.

2. Nor will a judgment recovered on the note so assigned be allowed as a set-off.

3. The interest of the assignor of such note does not affect his competency as a witness for defendant, where the assignee is dead and the suit in which the judgment is sought to be set off is by his administratrix.

[Opinion filed August 27, 1890.]

APPEAL from the Circuit Court of Randolph County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

On August 24, 1888, Louis Granneman filed his bill for injunction in the court below, making Campbell, as sheriff. William Mulholland and Margaret Mulholland, defendants. It is alleged in said bill that complainant recovered judgment against the Mulhollands for \$162.66 and costs at the March term, 1886, of said court, which judgment is in full force and unpaid. That execution thereon was duly issued April 12, 1886, and returned by the sheriff "*nulla bona*" July 10, 1886, and an *alias* execution thereon was duly issued to the sheriff August 20, 1888, and he still holds the same. That Margaret Mulholland recovered judgment against complainant for \$150 and costs at the March term, 1888, of said court, on which judgment execution was duly issued and delivered to Campbell as sheriff, who threatens to and will levy the same on complainant's property unless restrained by the order of the court. That William Mulholland is wholly insolvent. Offers to set off in full complainant's judgment against that of

Sprigg v. Granneman.

Margaret Mulholland, and alleges unless he is allowed to do so he will suffer great delay and unnecessary expense in the collection of his said judgment. That the indebtedness upon which said judgment against the Mulhollands was rendered was incurred solely upon the ability of said Margaret to pay. Prays that Campbell, the sheriff, be enjoined from levying said execution upon complainant's property, and that said Margaret be enjoined from proceeding to collect her judgment; that complainant's judgment be set off and allowed against said judgment and execution of Margaret Mulholland in full satisfaction thereof and for general relief, and answer under oath is waived. The writ of injunction was issued as prayed for and duly served on said defendants.

At the March term, 1889, defendants answered, admitting the recovery of said judgments and issuing of executions thereon as alleged. Denying that the indebtedness upon which complainant's judgment was rendered was incurred solely upon the ability of Margaret to pay. Denying every other allegation in said bill not expressly admitted or denied. Denying complainant's right in law or equity to set off his said judgment as claimed by him. Averring that prior to the filing of said bill and on the date of said judgment against complainant, it was assigned by Margaret to Ralph E. Sprigg for \$100 in cash and an attorney's fee theretofore due him by assignment of record, of which assignment complainant had full notice. Defendants expressly disclaim any interest or title in or to said judgment, but aver the same is the property of Sprigg and had been his property long before said bill was filed. At the same March term appellant, upon his own petition setting up his right as assignee, was made a defendant and filed his answer. The answer admits the obtaining of said judgments and issuing of the executions thereon as alleged in the bill. That the same remain in full force and effect. Avers that on March 31, 1888, Margaret Mulholland, in writing upon the records of said court, assigned her said judgment to him for a valuable consideration, and the same is now held and owned by him. That he notified complainant of the said assignment and demanded of

him payment of said judgment and complainant promised to pay the same and asked respondent to delay issuing an execution thereon. Denies the indebtedness for which complainant's judgment was obtained, was incurred solely upon account of said Margaret's ability to pay. Alleges complainant's judgment against the Mulhollands, sought to be set off, was recovered upon a promissory note assigned to complainant by one A. H. Burlingame without consideration, upon an agreement and understanding between them, that complainant was to pay Burlingame one-half of whatever amount he might thereafter collect from said note and no payment was to be made for the same until a collection of said note or part thereof was made. Denies all other allegations of the bill not admitted by his answer and denies complainant had at the time of filing his bill, any demand against the judgment so owned by respondent, that was a proper matter of set-off either in law or equity against said judgment.

On September 9, 1889, upon suggestion of the death of Louis Granneman, his administratrix, Caroline Granneman, was substituted as complainant. The bill was amended by alleging appellant claimed some right or interest as assignee or otherwise, but insists whatever rights or interests he may have in or to said judgment of Margaret against Louis Granneman were acquired with full knowledge of the interests and rights of said Louis, and are also subordinate to complainant's rights and interests. The foregoing answers were refiled to the amended bill, replications were interposed, and the cause was heard upon these pleadings, the admissions of the parties, and evidence introduced in open court. By the decree the court finds the allegations of the bill and amendment true in substance, and that the equity of the case is with complainant. The judgment of Granneman against the Mulhollands is ordered and decreed to be set off in full satisfaction of the judgment against him; both judgments ordered and decreed canceled, as satisfied in full; the injunction made perpetual, and defendants Margaret Mulholland and Ralph E. Sprigg decreed to pay the costs. From this decree Sprigg took this appeal.

Messrs. J. J. MORRISON and H. C. HORNER, for appellant.

Messrs. WILLIAM HARTZELL and J. B. SIMPSON, for appellee.

GREEN, J. It was admitted on the hearing that defendant Campbell had the execution against Louis Granneman, and was seeking to levy the same at the time the injunction was sued out, and that both the Mulhollands are, and when the suit was commenced were, insolvent. It was further admitted that Margaret Mulholland, under a distress warrant, seized property in the hands of Louis Granneman, who, at *the December term, 1885*, brought replevin suit for the property, was defeated, and judgment against him and for the return of the property was rendered *May 11, 1887*. On August 25, 1887, Margaret Mulholland brought suit against Granneman to recover the value of the grain by him replevied, which he had not returned as ordered by the judgment of the court in the replevin suit. While the replevin suit was yet pending, and some time *in 1886*, Granneman called on one A. H. Burlingame and asked him if he had a note on the Mulhollands, and learning he had such a note, proposed to take it, and if he beat *this Mulholland* he would give Burlingame fifty cents on the dollar for it, and if he couldn't do anything with the note and gain the case, he was to return the note to Burlingame.

In this interview Granneman disclosed to Burlingame the fact that he had some difficulty with *Mrs.* Mulholland concerning some grain, and she had sued him or was about to sue him for the grain, and he was going to make an offset of the note. Burlingame thereupon assigned the note to Granneman without recourse, upon the terms and conditions proposed, and received no consideration therefor. The note was for \$125.27, dated June 16, 1882, and was payable in four months, with eight per cent interest. Granneman, having thus procured this note, at once brought suit on it, and at the March term, 1886, of said Circuit Court, recovered the judgment against the makers sought to be allowed as a set-off in this case. Afterward, in the said suit of Margaret against him, Granneman, among other defenses, pleaded this judgment as a set-off, and by another plea set up *the note assigned*

to him as a set-off. To these pleas demurrers were sustained, and on the trial plaintiff recovered her said judgment. From the facts proven we are satisfied that when Granneman procured the assignment of the note to him, it was solely for the purpose of using it as a set-off against any claim of Margaret Mulholland for the grain unlawfully taken by him, and in anticipation of his probable defeat in the pending replevin suit and the litigation likely to result therefrom. This purpose was understood by Burlingame at the time he assigned the note. No sale of the note was in fact made, nor was it understood or intended by the parties to be a *bona fide* sale of the note to Granneman. The device of assigning the note to give the transaction an appearance of a sale and transfer did not change its real character. The form of the pretended purchase unexplained might evidence a real sale and transfer, but the *bona fides* with which a set-off is created is always a legitimate subject of inquiry. *Fair v. McIver*, 16 East, 131.

Nor did the merging of the note in the judgment against the Mulhollands, remove the taint which attached to the original transaction. It was but another step taken to accomplish the real purpose of the parties, which was to use *the debt due Burlingame*, as a set-off against the legal claim of a person for her property unlawfully taken by Granneman. The law applicable to the facts in this case, as we understand it, forbids the allowance of the set-off claimed by the appellee and decreed by the court below. "As a set-off in general is only allowed for such claims as in good faith and absolutely belonged to the party at the commencement of the action, it follows that it does not extend to claims purchased conditionally for the purpose of using them as a set-off and with an agreement to return them to the seller if they were not so used. It would be a fraud upon the statute to allow the defendant in anticipation of a law suit to get the use merely of the claims of others, with which to defeat his adversary." "An indorsement of a note by the payee to one with the understanding if he can use it as a set-off to a demand held against him by another, he is to pay the amount, otherwise it is to be returned to the payee, does not confer on the assignee such a property

in the note as will enable him to use it as a set-off against such demand." Waterman on Set-off, Sec. 45, citing Strans v. Eagle Ins. Co., 5 Ohio (N. S.), 59; Adams v. McGrew, 2 Ala. (N. S.) 675; McDade v. Mead, 18 Ibid. 214.

We perceive no equitable grounds precluding the application of the foregoing rules to the case at bar, or requiring us to permit Granneman's judgment against the Mulhollands to be used as a set-off against the judgment which is shown by the records to have been duly assigned, "for value rec'd" to Ralph E. Sprigg, and thus deprive the latter of the benefit of his purchase. We are also of the opinion that Burlingame was a competent witness and his testimony proper to be considered. He was not a party to the suit and his interest in the event of the suit, if he had any, was against the defendants, and not adverse to the complainant. Other points are raised in the briefs and arguments not necessary to discuss or decide, inasmuch as we think enough has been said, if our view is correct, to dispose of the case.

The order and decree of the Circuit Court is reversed and the cause remanded with directions to dissolve the injunction and dismiss the bill as amended.

Reversed and remanded with directions.

GEORGE W. WILLIAMS ET AL.

V.

MIAMI POWDER COMPANY.

Negotiable Instruments — Note — Execution — Personal Description — Pleading — Evidence.

1. In an action on a note a plea of the general issue sworn to amounts also to a plea of *non est factum*, and a special plea in addition thereto, that the note was signed by defendants as officers of a corporation and not individually, being no more than the general issue, is demurrable.

2. Under the sworn plea of the general issue, plaintiff fully makes out its case by proof of execution of the notes.

36	107
54	297
36	107
72	533
36	107
85	415

3. The fact that the note is signed by defendants as officers of a corporation, and the name of the corporation is attached, does not release defendants from individual liability in the absence of evidence that they were officers, and that the note was intended as the note of the corporation only.

4. Proof of defendants' handwriting is admissible to show execution of the note.

[Opinion filed August 27, 1890.]

APPEAL from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Appellee brought his action of assumpsit against appellants and the Salem Coal and Mining Co. on three promissory notes, one for \$167.24 due in thirty days, one for \$200 due in sixty days and one for \$200 due in ninety days. The notes are of the same date and alike in form and manner of signing except as to the amounts and time of maturity. The first is as follows:

"SALEM, ILLS., September 7, 1888.

"\$167.24.

"Thirty days after date we promise to pay to the order of Miami Powder Co. one hundred and sixty-seven 24-100 dollars with 8 per cent interest from maturity without defalcation, value received.

"P. E. CUTLER, Pres.

"G. W. WILLIAMS, Sec'y.

"Salem Coal and Mining Co."

Appellants filed plea of general issue sworn to, and a special plea in which it is averred that the several sums of money sued for was the sole and separate debt of the Salem Coal and Mining Co. and was not the debt of appellants, and that the defendant Cutler was president of the defendant the Salem Coal and Mining Co., and the defendant Williams was the secretary of said Salem Coal and Mining Co., and as such president and secretary the said Cutler and Williams executed the notes in the usual course of business of the Salem Coal and Mining Co., and plaintiff accepted the notes as the separate notes of the Salem Coal and Mining Co., without this, that said Cutler and Williams executed said notes in their

individual capacity. To this plea an affidavit of the truth of the same was attached.

A special demurrer was interposed to the special plea, assigning for cause that that plea amounted to the general issue, which was sustained, and defendants elected to stand by their special plea. Issue was joined on the general issue and trial had before the court without a jury. A default was entered against the Salem Coal and Mining Co., and on trial witnesses were called who testified to their knowledge of the handwriting of Cutler and Williams, and that the signatures to the notes were in their handwriting respectively. To this testimony defendants objected, insisting it must be shown in what capacity defendants Cutler and Williams signed their names, which objection was overruled and defendants excepted. No evidence was offered by the defendants, and a verdict and judgment was entered in favor of plaintiff and against all the defendants for the sum of \$804.45. The defendants Cutler and Williams appeal, and assign for error the sustaining the demurrer to the special plea, the overruling defendants' objection to the evidence of handwriting, and entering judgment against appellants.

Mr. J. B. KAGY, for appellants.

Appellants insist, first, that the notes on their face show them to have been executed by the Salem Coal and Mining Co., by its president and secretary. The Salem Coal and Mining Co. is a body corporate under the laws of the State of Illinois, and appellee sued it as such, in this case, as a joint promisor and maker of these notes.

The notes were executed in the correct corporate name of the company, in the precise form in which appellee declared against it. Appellee is estopped from denying the existence of this corporation, or that he had transactions with it in which it gave its promise to pay these notes. These notes are in no essential respect dissimilar in form or mode of execution from that sued on in *Scanlin v. Keith*, 102 Ill. 634, where it was held the note on its face was that of the corporation, and not of the individuals signing the corporate name. Stress

was laid on the fact that in *Scanlin v. Keith*, *supra*, the seal of the corporation was attached on the left of the note, and that that fact made it the note of the corporation in that case.

Though the seal was an element in that case, it was not indispensable. The Supreme Court has repeatedly said, the manner of executing written instruments by a corporation is by signing the individual names of its officers with the addition thereto of their official style. *New Market Savings Bank v. Gillet*, 100 Ill. 261; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 487; *Ada Street Church v. Garnsey*, 66 Ill. 132; *Little v. Bailey*, 87 Ill. 240.

A note is not executed until it is delivered. *Hunt v. Weir*, 29 Ill. 83; *Edwards on Bills*, 188.

Appellee was bound under the pleadings to prove execution. *Greenleaf's Ev.*, 2d Vol. Secs. 8, 16, 161, 9th Ed.

The notes in the case at bar were properly signed by the Salem Coal and Mining Co., and the individual names followed by their official designations were but a necessary part of the corporate signature. Hence no individual signatures appear to the notes, and no individual liability ensued against appellants. *New Market Savings Bank v. Gillet*, 100 Ill. 261, and *supra*.

No case was made out against appellants. They were strangers to the notes so far as their individual execution of them is concerned. *Davison v. Hill*, 1 Ill. App. 70.

The issue is one of law, whether the appellants, on the face of the notes, executed them as their individual undertakings. "It needs no extrinsic evidence to show such a note is the obligation of the corporation." "Such is the common understanding from what appears on the face of the instrument itself." *Scanlin v. Keith*, *supra*, 644; *New Market Bank v. Gillet*, 100 Ill. 261; *Hitchcock v. Buchanan*, 105 U. S. 416.

But should the view be taken that it is not apparent on the face of the notes, in this case, that they were executed by appellants as officers of the corporation, and that a doubt existed as to whose promises they are, then extrinsic evidence, between the parties, payee and makers, was competent to explain the real intention and fix the liability according to

the understanding of the parties at the time of the execution and delivery of the notes.

By filing the plea of the general issue under oath, the burden was cast upon appellee to affirmatively show by proofs, that all the defendants, three in number, executed the notes in their several individual capacities as joint makers, since they are so declared against. The allegations and proofs must correspond. The "name" and "style" of their execution averred, must be proved as alleged. The proofs failed. The plaintiff's proofs should have been made as at the common law. *Starr & C. Ill. Stats. Chap. 110, 1798, Sec. 34; Dwight v. Newell, 15 Ill. 332; Neteler v. Culies, 18 Ill. 188; Martin v. Culver, 87 Ill. 49; Wallace v. Wallace, 8 Ill. App. 69; Stevenson v. Farnworth, 2 Gilm. 715; Kennedy v. Hall, 68 Ill. 165; Smith v. Knight, 71 Ill. 148.*

Appellants' special plea set up extrinsic facts and circumstances explanatory of the real intention of the parties to the notes, and shows that intention to have been, that they were the notes of the Salem Coal and Mining Co., and were so received and accepted by appellee, etc., and brought the case within the doctrine announced in *Hypes v. Griffin, 89 Ill. 134*, as to extrinsic proofs.

This element of appellants' defense was within the peculiar office of their special plea, which sought the introduction of new matter in defense, not apparent in the declaration, and submitted to the court, as a matter of law, how far the facts stated in the plea were a lawful defense. 1 *Chitty's Pleading, 9th American Ed., pages 473, 507, and authorities cited.*

Mr. HENRY C. GOODNOW, for appellee.

The general issue being pleaded, the rule is, any facts that would defeat the plaintiff's cause of action may be given in evidence under such issue and a special plea setting up such facts would be obnoxious to a demurrer. *Manny v. Rixford, 44 Ill. 129.*

If the matters set up in special plea are a defense they could be given in evidence under the general issue, and for this reason, if no other, the plea would be bad.

2d. This plea contradicts the terms of the notes and contemplates contemporaneous oral evidence to explain and contradict appellants' undertaking, which is not allowable. *Stobie v. Dills*, 62 Ill. 432; *Hypes v. Griffin*, 89 Ill. 134; 1st Greenleaf Evidence, Chap. 15, Sec. 275.

3d. This plea does not show that the Salem Coal and Mining Co. is a corporation organized to deal in, and whose business was dealing in, negotiable securities, nor engaged in a business requiring the payment of money as a part of its legitimate business, nor is it alleged in said plea that defendant did not sign said notes as sureties. This it must show *Hypes v. Griffin*, Adm'r, 89 Ill. 135.

The additions, president and secretary, or any other such designation at the end of a person's name, have a well defined legal meaning in law, which is a description of the person. They are used to designate the person, and not to indicate the capacity in which the person signed such instrument. *Village of Cahokia v. Rautenberg*, 88 Ill. 219; *Powers v. Briggs et al.*, 79 Ill. 493.

These notes contain apt words to charge appellants. "We promise to pay" are the charging words in these notes and fix their liability as makers. In which case, if words are added descriptive of agency, such words are surplusage. *Hancock v. Yunker*, 83 Ill. 208.

Nor can it be shown by parol that they were only acting for and on behalf of another. *Hypes v. Griffin*, Adm'r, 89 Ill. 134.

Where the names of the principal and agent both appear upon an instrument it will be held to be the note of him who signs it unless it satisfactorily appears that he signed it in a mere ministerial character intending to bind another. *Powers v. Briggs et al.*, 79 Ill. 493.

If the additions, president and secretary, disclose agency, then both the principal and agent appear to these notes and all are liable.

A note reading, "We promise to pay," and signed with the name of a corporation and the names of its president and secretary, with additions of their respective official designa-

tions, binds the president and secretary personally, and extrinsic evidence is inadmissible to show that it was not so intended. *McCandless v. Bell Plaine Canning Co.*, Iowa, 42 N. W. Rep. 635; *American I. Co. v. Stratton*, 59 Iowa, 696; *Hoffner v. Brownell*, 70 Iowa, 591, and 75 Iowa, 341; *Village of Cahokia v. Rautenberger*, 88 Ill. 219; *Stoble v. Dills*, 62 Ill. 432.

By no construction of language, or principle of law, can the terms president and secretary, affixed to the names of Cutler and Williams, be intended to import they were the agents of the Salem Coal & Mining Co. *Mears' Ex. v. Morrison*, Breese, 224; *Bickford v. First Nat'l Bank*, Chicago, 42 Ill. 239; *Sperry, etc., v. Fanning et al.*, 80 Ill. 371.

In the cases cited in Breese and 42 Ill. above, the court says where the instrument is signed "A B, agent," that mode of signing does not disclose the fact that the signer is the agent of any one, and if that is the only indication of agency he will be bound personally. These cases are on all fours with the case at bar.

Courts are powerless to disregard the terms of a contract plainly expressed, but must enforce them according to the intent of the parties, as shown by the language used in the contract. *Coey v. Lehman*, 79 Ill. 173.

Where the parties reduce their contract to writing, they must be governed by its provisions, and their intention must be gathered from the terms of the contract. *Kimball et al. v. Custer*, 73 Ill. 390; *Massie v. Belford*, 68 Ill. 290.

The court will construe the contract without the aid of witnesses to explain its meaning. *McAvoy v. Long*, 13 Ill. 147; *Lintner v. Millikin*, 47 Ill. 178; *Merchants Ins. Co. v. Morrison*, 62 Ill. 243.

PHILLIPS, J. The special plea did not admit any fact averred in the declaration, but denied the material averments of that declaration. It therefore amounted to the general issue. The general issue was pleaded and issue joined thereon, and all the facts set up in the special plea, which were admissible in evidence, could be given in evidence under the general

issue. It was not error to sustain the demurrer to the special plea. *Manning v. Rixford*, 44 Ill. 129. The affidavit of defendants being attached to the general issue, under the practice of this State it was a plea of general issue and *non est factum*, and only as a plea of *non est factum* did it put the appellee on proof of the execution of the instrument. By the introduction of proof of execution of the notes, the plaintiffs fully made out its case on that issue. *Pritchett v. The People*, 1 Gilm. 525. It was not incumbent on the plaintiff to show in what capacity appellant signed the notes.

It was not error to overrule the objection of appellants to the introduction of evidence of the handwriting of appellants. The notes were in the ordinary form of commercial paper and the addition to the name of Cutler, as president, and to the name of Williams, as secretary, does not limit their liability or make their signatures as that of the agent of a disclosed principal. There is nothing to show that Cutler was president and Williams secretary of the Salem Coal & Mining Company to make it the note of the corporation alone, nor is there any evidence to show the notes were those of the Salem Coal & Mining Company for their debt. The absence of all evidence on these questions renders it necessary to construct these notes according to the face of the notes, and in doing so the records "Pres." and "Sec'y" are to be regarded as *discriptionæ personæ* merely. They must be held according to the terms of their contract. *Hypes v. Griffin*, Adm'r, etc., 89 Ill. 134; *Stobie et al. v. Dills*, 62 Ill. 432; *Bickford v. The First Nat. Bank of Chicago*, 42 Ill. 238; *Trustees of Schools v. Rautenberg*, 88 Ill. 219; *Powers v. Briggs et al.*, 79 Ill. 493; *Scanlan v. Keith*, 102 Ill. 634. There was no error in entering judgment against appellants for the amount of the notes.

The judgment is affirmed.

Judgment affirmed.

Bowman v. Ash.

HORATIO J. BOWMAN, TRUSTEE,

V.

JOHN W. ASH ET AL.

36	115
143	649

Fraudulent Conveyances—Suit to Set Aside—Trustee's Sale—Evidence—Creditor's Bill.

1. A *bona fide* trustee's sale will not be set aside because the value of the property was much greater than the amount bid therefor.

2. A trustee's sale will not be affected by an inaccurate statement of the amount of the debt, contained in the notice of the sale, unless made for fraudulent purposes.

3. In a suit to set aside various conveyances as fraudulent, in view of the evidence it is *held*: That certain of the conveyances were in good faith and for valuable considerations, while others were properly set aside.

[Opinion filed August 27, 1890.]

IN ERROR to the Circuit Court of Madison County; the
Hon. AMOS WATTS, Judge, presiding.

Mr. A. W. METCALFE, for plaintiff in error.

Messrs. WISE & DAVIS, for defendants in error.

PHILLIPS, J. This was a creditor's bill brought by plaintiff in error, a creditor of John W. Ash and Marcus H. Topping, against John W. Ash, Margaret E. A. Ash, Jared P. Ash, Marcus H. Topping, William M. Ash, Horace C. Irwin, Joseph Atson, Mary Atson, John Haley and M. Anne Riggins. The bill alleges the rendition of a decree against Marcus H. Topping and John W. Ash, at the March term of the Madison Circuit Court, A. D. 1886, for the sum of \$23,733.05, the issuing of executions and the return thereof unsatisfied. The bill alleges further that in September, 1886, one Simeon Ryder made his last will and testament, and on the 9th of April, 1877, a codicil thereto, and died in August, 1877; that Ash and Topping were executors and trustees under

said will without bond, accepted the trust and entered upon the duties thereof, and failed to account for property and moneys belonging to said estate to the amount of such decree; that before accepting such trust, John W. Ash was the owner of certain described real estate alleged to be of the value of \$30,000; that in 1881 certain proceedings were commenced to require a settlement of said estate before the County Court; that on the 20th of January, 1881, a pretended deed of conveyance was made by John W. Ash to his brother Absalom T. Ash, for a pretended consideration of \$5,000, conveying certain described premises, and on the 22d day of January, 1881, Absalom T. Ash conveyed the same premises, with other property, to Margaret E. A. Ash, the wife of John W. Ash, and denies that any consideration was paid for said conveyances, but if there was, it was the money of John W. Ash; that Margaret and John W., on the 16th of December, 1885, conveyed a portion of said premises to Joseph and Mary Atson, who executed a mortgage to Margaret on the lands so conveyed to them, to secure a note for \$250; that on the 22d of October, 1881, another portion of such land so conveyed by Absalom T. Ash to Margaret was conveyed to William Flynn for a consideration of \$1,500. It is further alleged that on the 18th December, 1882, John W. Ash and wife conveyed certain lands to Wm. M. Ash, a son, for a pretended consideration of \$1,000; that on a certain execution, lands belonging to John W. Ash were sold and bid off by Horace C. Irwin for the sum of \$325, who assigned the certificate to Margaret E. A. Ash, to whom a deed was made by the sheriff, and charges that John W. furnished the money to pay for the same. The bill further charges that on the 1st January, 1872, John W. Ash executed a certain deed of trust to one James Cooper as trustee, to secure one note to John P. Ash for the sum of \$225; one note to Absalom T. Ash for \$2,809.98, and one note to Jared P. Ash for the sum of \$1,321.51, and that said notes had been paid by John W. Ash, but at the September term, 1885, of the Alton City Court, a decree was entered in a certain proceeding by which John Haley was made trustee as successor in trust to said Cooper, who under said deed sold

Bowman v. Ash.

the lands in said deed described to Jared P. Ash on the 29th day of October, 1885, and for a consideration of \$3,688.15, and said lands were averred to be worth at the time the sum of \$12,000. It is further averred that on the 3d day of April, 1884, John W. and wife conveyed certain lands to one M. Anne Riggins, a daughter, for a pretended consideration of \$1,000. The bill further charges that John W. Ash was the owner of a set of abstract books, which, on the 1st of January, 1887, he sold and conveyed to his brother, Jared P. Ash.

All these sales and conveyances are averred to be fraudulent and made to hinder and delay creditors. Subsequently by an amendment to the bill it is averred that on the 13th May, 1878, John W. Ash and wife conveyed certain lands to Ellen McNeil, a daughter, for a pretended consideration of \$2,000, which is averred to be colorable merely and without consideration, and that Perley B. Whipple and George Smiley claim some interest in the lands so conveyed to Ellen McNeil. It is further in said amendment stated that the note and mortgage made by Joseph and Mary Atson has, since the filing of the original bill, been assigned and transferred to Henry C. Priest, who had notice of complainant's rights. Ellen McNeil and Isaac McNeil, her husband, made default. Answers were filed by John W. Ash, Margaret E. A. Ash, Jared P. Ash, William M. Ash, William Flynn, Horace C. Irwin, Joseph Atson, Mary Atson, John Haley, M. Anne Riggins and Henry C. Priest. Previous to the hearing, the bill was dismissed as to William Flynn, Perley Whipple and George M. Smiley.

The answer of Henry C. Priest states that he purchased the note secured by mortgage made by Joseph and Mary Atson for its value, principal and interest, and paid cash therefor, and had no notice of any litigation, and the same was purchased before the maturity of the note. The answer of Joseph and Mary Atson admits the purchase of premises alleged, but denies all fraud or notice of any, and avers they were *bona fide* purchasers for value, to-wit, \$8,000—\$5,500 cash, and note secured by mortgage due four years from date for \$2,500. The answer of William M. Ash admits the exe-

cution of a deed to him as alleged in the bill, but denies any fraud or notice of any rights of complainant or any one else; and avers he is an innocent purchaser, and paid \$1,000 for the property conveyed to him. The answer of John Haley admits the execution of deed under power in the deed of trust and decree of court as trustee, for the price stated in the bill, and the conveyance of the same to Jared P. Ash, and avers he acted in good faith, and denies all fraud. The answer of M. Anne Riggins admits the conveyance to her, as alleged in the bill, and denies it was fraudulent, but was made in good faith and for a valuable consideration.

The answer of Horace C. Irwin admits the purchase of the property on execution sale and assignment of certificate to Margaret E. A. Ash, but denies all fraud, or that John W. Ash furnished the money, or that the purchase and assignment was by any previous arrangement or agreement. That he was not in debt to any one and made the assignment in good faith. The answer of Jared P. admits the execution of deed of trust, the decree appointing the successor in trust and the sale by the trustee and conveyance to him, and avers the note and deed of trust were in good faith for a valid debt owing him and no part of the principal or interest had been paid, and the whole amount was due him when the sale took place. Denies all fraud or collusion. Admits the purchase of the abstract books and avers the purchase for value. The answer of John W. Ash admits the decree, but denies all fraud charged, avers the conveyances were made in good faith and for a valuable consideration. The answer of Margaret E. A. Ash denies all fraud charged, and avers the conveyance to her for a valuable consideration, and alleges the money paid for the same was acquired by her from persons other than her husband and by her own exertions. A decree was entered setting aside the conveyance made to M. Anne Riggins, also setting aside the deed of the property conveyed by the sheriff to Margaret A. E. Ash, but all other allegations were found for the defendants and the bill dismissed as to all other matters. The complainants sue out this writ of error and assign for error the finding of the court for the defendants.

The conveyance to William M. Ash, made by John W. and Margaret Ash, is shown by the evidence to be lands conveyed to Margaret Ash by Absalom T. Ash, and were never owned by John W. Ash. The decree so finds, and is warranted by the evidence. It was not error to dismiss the bill as to Wm. M. Ash. The evidence shows that on the 1st of January, 1872, a deed of trust was made by John W. Ash to James T. Cooper to secure certain notes; that deed of trust was made prior to the execution of his will by Ryder; the evidence shows the notes were due and unpaid. The sale made by Haley of the premises in the deed of trust described, under the decree appointing him successor in trust, is sought to be set aside by denial of the indebtedness, claiming the same had been paid, and by reason of the value of the property being much greater than the amount bid thereon. There is no evidence to show the payment of the indebtedness, but on the contrary the existence of the indebtedness and the good faith of the parties to the deed and the decree is shown. Knowledge of the time of sale existed, and the fact that the value of the property was much greater than the amount bid at the sale would not authorize the sale to be set aside where the transaction was shown to be in good faith. *Parnly v. Walker*, 102 Ill. 607; *Cleaver v. Green*, 107 Ill. 68; *Burns v. Middleton*, 104 Ill. 411.

The objection made in argument, that the sale by Haley, as trustee, is not authorized by anything appearing in evidence, is obviated by the averments of the bill, which show a decree appointing Haley successor in trust. It is further insisted, in argument, that the notice given by the trustee is so defective that the sale made under the deed of trust should be set aside, as the sale was made to pay principal and interest of a note for \$3,137.91, while the notice was for a sale to be made for the default in payment of a note for \$1,321.55. The notice, however, gives the date of the note and the rate of interest. But the deed of trust only requires the notice to state the time, terms and place of sale, and that is contained in the notice. An inaccurate statement of the amount, unless done for fraudulent purpose, can not affect the sale. *Bush et al. v.*

Sherman, 80 Ill. 160; Fairman v. Peck et al., 87 Ill. 156. Jenkins v. Pierce et al., 98 Ill. 646.

It was not error to dismiss the bill as to Jared P. Ash and John Haley so far as that conveyance is sought to be set aside. As to the conveyance made by John W. Ash to Absalom T. Ash of certain premises on the 23d of January, 1881, which premises were conveyed by Absalom T. Ash to Margaret E. A. Ash on the 22d of January, 1881, Margaret E. A. Ash testifies that from the time of her marriage in 1852 to the time of the conveyance, she had kept boarders, doing all the work of her household, and the money derived therefrom was given to her husband by her to be kept by him for her, and that she received a small inheritance from an ancestor to the amount of \$450, and that that amount made by her in keeping boarders, thus placed in the hands of her husband, amounted to the sum of \$14,000. Her husband testifies to the same state of facts. The consideration of the conveyance by Absalom T. Ash to Margaret E. A. Ash is the sum of \$6,000, and that amount is by both husband and wife sworn to have been paid to Absalom T. Ash. It is insisted that the earnings of the wife, prior to the act of 1869, belonged to the husband; without considering that question it is sufficient that over ten years elapsed after that act and before this conveyance. The only evidence as to this transaction came from the parties to it and these witnesses were all called by the complainants and there is no evidence to show the facts so testified to, to be untrue.

It was held in Sawyer et al. v. Mayer et al., 109 Ill. 461: "These witnesses were all produced by complainants, and every one of them says the sales were in good faith, for a valuable consideration, which was fully paid. Many of the answers of the witnesses as to where they got the money with which to make the purchase are very unsatisfactory, and it is argued for that reason they ought not to be believed. But whom shall we believe? These are the most material witnesses and if their testimony is rejected the record contains no evidence whatever tending to impeach, in any considerable degree, the fairness of the several conveyances.

Should the testimony of these witnesses be considered, that which makes for them must be considered as well as that which is against them. When that is done it is seen that these were actual sales in good faith, upon a sufficient money consideration, and with no intent to hinder and delay the creditors of the grantor in the collection of their claims against him. The burden of proving the conveyances fraudulent and done with intent to hinder and delay the creditors of the grantor, rested upon complainants, and that has not been done. All of the defendants examined as witnesses, testify to the fairness of the conveyances, and unsatisfactory as the testimony is in some respects, there is nothing in the record that sufficiently overcomes it." With the sale thus proven, however unsatisfactory this evidence may be, it is the only evidence offered by complainants; it must be held sufficient to show the good faith of the transactions, the conveyance by John W. to Absalom T., is by John W. testified to have been for a valuable consideration. Long before the death of Ryder and before the execution of his will, John W. was indebted to Absalom T. in the sum of \$2,809.88, for which he executed a note at ten per cent interest, and the same was secured by a deed of trust, and John W. testifies that he made the conveyance of the lands in satisfaction of the indebtedness to Absalom T.

There is no evidence in conflict with this, that the finding of the court that the conveyance from John W. to Absalom T., and by Absalom T. to Margaret E. A., were made in good faith and for a valuable consideration, was authorized from the evidence. Of the lands so conveyed to Margaret E. A. Ash, she conveyed to Joseph and Mary Atson a part of the same for a valuable consideration—receiving \$5,500 cash, and a note for \$2,500, secured by a mortgage, and that note, for a valuable consideration, she assigned to Henry C. Priest. It was therefore not error to dismiss the bill as to Joseph and Mary Atson and Henry C. Priest.

The sale of the abstract books to Jared P. Ash and the payment for the same is testified to by Jared P. and John W., both called by complainant, and under the rule announced in *Sawyer v. Mayer*, *supra*, it was not error to dismiss the bill

as to Jared P. Ash. "The defendant in error M. Anne Riggins, in her own right and as one of the heirs of Margaret E. A. Ash, deceased, assigns cross-errors, that the court erred in decreeing that the deed made by the sheriff of Madison county to Margaret E. A. Ash was fraudulent, and that the deed by John W. and Margaret E. A. to M. Anne Riggins was fraudulent. The evidence shows the assignment of the certificate by Irwin to Margaret E. A. was procured by John W. without the knowledge of Margaret, and while there is no evidence showing how Irwin was paid, yet, the assignment appearing to have been procured by John W., the decree properly set aside the conveyance so made by the sheriff.

The only consideration shown for the execution of the deed by John W. and Margaret to M. Anne Riggins, is by the testimony of John W. Ash; he states that the note for \$225, made by him to John P. Ash and secured by the deed of trust, was by John P. given to his daughter, and when asked as to the consideration, answered: "My daughter held the note of \$225, given by me to my father in the deed of trust to Cooper at the time the deed was made April 30, 1884; she gave me the note or due-bill for \$497, made payable out of rents to be collected by me, which I collected and applied on the note." If this answer means anything it means he was to pay the notes out of rents collected. From this answer it does not appear the note was delivered as the consideration for the conveyance, but payment made on the note from rents collected; the amount of such payments is not shown. It was not error to set aside the conveyance made to M. Anne Riggins. Finding no error in the record the decree is affirmed.

Judgment affirmed.

Rhoads v. City of Metropolis.

SOLOMON J. RHOADS
V.
THE CITY OF METROPOLIS.

86 123
144 580

Practice—Res Adjudicata—Presumption—Trespass.

1. A judgment for defendant in an action of trespass *quare clausum fregit*, brought against a city for removing soil from a street, in which issue is joined as to whether the street is a public highway or belongs to plaintiff, estops plaintiff from raising the same question in a subsequent prosecution against him for obstructing such street.

2. Where several issues are submitted, and a general verdict rendered, the presumption is that all the issues were found in favor of the prevailing party.

3. This presumption may be rebutted by showing that on one or more of the issues no evidence was offered.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of Massac County; the Hon. ROBT. W. McCARTNEY, Judge, presiding.

Appellant was charged with a violation of the city ordinance by unlawfully obstructing a street of the city by the erection of fences across it. He was convicted in the justice's court and judgment was rendered against him for \$10 fine and costs. He appealed to the Circuit Court and there judgment was rendered against the city for costs. The city thereupon sued out a writ of error from this court, and we reversed that judgment and remanded the cause at the February term, 1889, holding the judgment referred to in the stipulation hereinafter mentioned ought to have been admitted in evidence on behalf of the city. Upon being redocketed the cause was tried by the court upon a stipulation and judgment for \$10 and costs was rendered against defendant, to reverse which he took this appeal.

The stipulation is as follows: "*It is agreed and stipulated* by and between the parties to the above entitled suit, which

is a prosecution for the recovery of a penalty for the violation of a city ordinance in obstructing a street within said city, that the same shall be tried upon the following agreed state of facts: It is agreed that in the year 1885, the above named defendant brought an action of trespass *quare clausum fregit* against the City of Metropolis for removing the soil from the alleged street and grading the same. To this action of trespass the city pleaded: 1st. The general issue, with notice that evidence would be offered under the general issue to prove that the *locus in quo* was a public highway within the corporate limits of the city. 2d. The statute of limitations. 3d. That the *locus in quo* was the property of the city. Issue was taken on all the pleas. Evidence was offered by both parties on all the issues made by the pleadings, and also evidence was offered by both parties under the notice that the *locus in quo* was a public highway within said city. That is to say, under the notice evidence was given to the jury by the city, that the *locus in quo* was a public highway within the city, and that the acts done were in repairing the same. Rhoads gave evidence to the jury that the *locus in quo* was not a public highway. But no evidence was offered by the city under the general issue. The plaintiff, Rhoads, offered evidence to prove the allegation in his declaration. The jury found the defendant in that suit not guilty, and at the April term, 1887, of said court, a judgment was rendered for the defendant on the general verdict of not guilty.

Now, if the above verdict and judgment thereon concludes and estops Rhoads from offering evidence in the present suit to prove that the *locus in quo*, or the alleged street, which is the same identical property in controversy in the trespass suit, is not a public highway, or estops him from proving the property to be the property of himself, then the court is to render a judgment for the City of Metropolis and assess a penalty against Rhoads under the ordinance for \$10 and costs. But if such judgment does not operate as an estoppel as above set forth, then, and in that event, the court shall render a judgment in this suit in favor of Rhoads, and assess costs thereon against the City of Metropolis."

Rhoads v. City of Metropolis.

Mr. C. L. V. MULKEY, for appellant.

Messrs. COURTNEY & HELM, for appellee.

GREEN, J. We adhere to the views expressed in the former opinion, and hold that the verdict and judgment against Rhoads in his suit against the city, estops him from again controverting the right of the city to the street in question. That suit was between the same parties; the *locus in quo* is admitted to be the identical property in controversy in this case, and the right of the city to the street was the disputed question in the former suit, and that right having been litigated and determined against Rhoads, he should not be permitted to again dispute it. The authorities cited by us in the opinion referred to, sustain this position. But on behalf of appellant, it is claimed that the plea of the statute of limitations having been interposed by the city in the former suit, the jury might have found the verdict for defendant on that issue alone, without necessarily determining the other issues in its favor. And, furthermore, that the title of Rhoads to the property was not in question, as determined in said suit, and hence he ought not be estopped from setting up such title as a defense in this suit. The stipulation admits that Rhoads took issue on the plea of the city that the *locus in quo* was the property of the city, and that, with all the other issues, was submitted to the jury, and evidence was introduced by both parties on all the issues made by the pleadings. We understand the law to be, where several issues are submitted and contested, and a general verdict is rendered, the presumption is that all the issues were found in favor of the prevailing party. Freeman on Judgments, Sec. 272, *et seq.*; Herman on Est. and Res Judicata, Sec. 212, 227; Sheldon v. Edwards, 35 N. Y. Court of Appeals; 8 Tiffany, 288; White v. Simonds, 33 Vt. 178. This presumption may be rebutted by showing that on one or more of the issues no evidence was offered. The judgment is affirmed.

Judgment affirmed.

36	126
58	87

THE OHIO & MISSISSIPPI RAILWAY COMPANY

V.

AUSTIN BASS.

Railroads—Personal Injuries—Defective Appliances — Contributory Negligence.

In an action against a railroad company for personal injuries received by a brakeman while uncoupling cars, by reason of defective road-bed and lack of a handhold on the car, it is held that plaintiff's negligence in attempting to uncouple the cars while in motion, knowing of the absence of the handhold, releases the company from liability.

[Opinion filed August 27, 1890.]

APPEAL from the Circuit Court of Clay County; the Hon. C. C. Boggs, Judge, presiding.

This is an action brought by appellee to recover for injuries sustained while acting as brakeman on defendant's freight train. The negligence charged is a defective condition of the roadbed and rails of defendant's road at the place and time the injury was sustained, and the failure to provide a handhold on car.

The plaintiff was a witness on the trial and testified that he was injured as alleged; that he was a brakeman on the local freight going east, which had a car of coal to be left at Avis-ton station; he was ordered by the conductor to set out the car; he gave the signal to the engineer to back up, and while the train was in motion at the rate of three or four miles an hour, went in between the cars and attempted to draw the coupling pin, walking between the cars, while so in motion, about fifteen feet, and was not able to loosen the pin. He got on the car to set the brake, which would not hold, and which he had noticed at the time he jumped from the car; went between the cars and pulled the pin, and at that time, by either striking a sliver on the rail or being caught between a couple of ties,

he does not know which, tripped and fell and received the injury. There is no handhold on the cars. In the absence of the conductor the engineer obeys the brakeman in moving and stopping the train when attending to couplings. He could not signal the engineer to stop when he first found he could not pull the pin, because he desired to do the work quickly. One of the duties of brakeman is to couple and uncouple cars. The manner of performing the duty is left to his judgment.

In the absence of handholds, an attempt to make an uncoupling while the cars are in motion, subjects the brakeman to unusual danger—great danger. When there is nothing to catch hold of, it is unsafe; to go in between the cars while in motion, very unsafe; when standing still it would be safe; could have given the engineer the signal and had the train stopped, if he had chosen that way; did not, because the conductor told him to do the work as quick as possible; did not because they were behind time; he was familiar with the rule on the time card to take the safe side in case of the least doubt. There was conflict in the evidence as to the condition of the road-bed and the condition of the rails at the time, and there was evidence to show the mode in which duties of brakemen were to be performed was not prescribed, but left to and governed by the judgment of the brakemen. That plaintiff had had over eight months experience as brakeman on this road, was shown. The jury found specially that the plaintiff's fall under the cars was caused by his foot being hung between the ties, or being tripped by the unevenness of the road-bed. That the road-bed was defective as alleged in the declaration; that the rails were not defective as charged; that the defects in the road-bed were open and obvious to inspection; that the plaintiff knew there was no handhold on the car at the time the injury was received. A verdict and judgment for plaintiff for \$1,500.

Messrs. GARLAND POLLARD and PERCY WERNER, for appellant.

Messrs. COPE & BURTON, for appellee.

PHILLIPS, J. Errors are assigned as to the rulings of the court in the admission and exclusion of evidence and in instructions given by plaintiffs which, with the view we take of this case, we deem it unnecessary to consider at this time.

The evidence of the plaintiff conclusively shows that just previous to the injury he had knowledge of the fact that there was no handhold on the car, and in the absence of such handhold he states it was very unsafe to attempt to uncouple when in motion, and in their absence, an attempt to uncouple subjects the brakeman to unusual danger, great danger, as testified to by him. He was in control of the train and had a right to stop it, when the uncoupling could have been performed with safety.

The manner of performing the duty of uncoupling, he states, was left to his judgment, and the rule of the company, with which he was familiar, required in cases of doubt to take the safe side. He had no right to act with recklessness, and for the injury resulting from his carelessness and recklessness hold the company responsible. The T. W. & W. Ry. Co. v. Eddy, 72 Ill. 138; The U. Ry. & T. Co. v. Leahy, 9 Ill. App. 353; City of Bloomington v. Read, 2 Ill. App. 542; The I. C. R. R. Co. v. Jewell, 46 Ill. 99; The C. & A. R. R. Co. v. Monroe, 85 Ill. 25; The C., B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; The C. & N. W. R. R. Co. v. Cass, 73 Ill. 394.

The absence of handholds on the car was known to him; he knew it was dangerous and unsafe to make a running switch under the circumstances, and having control and exercising his own judgment of the manner of performing the duty, the injury received must be viewed as the result of his own want of proper care, disentitling him to any action therefor. C. & A. R. R. Co. v. Rush, 84 Ill. 570. The motion for a new trial should have been allowed. The judgment is reversed and the cause will not be remanded.

Judgment reversed.

Bonny v. Bonny.

JOHN R. BONNY

v.

REBECCA ANN BONNY, ADMINISTRATRIX.

Trusts—Consideration—Administration—Evidence—Mortgages.

1. In a suit by an administratrix, to compel the payment of a mortgage out of money received by defendant from an insurance company on a policy on her intestate's life, payable to defendant, which money it is alleged is held by defendant in trust to pay the debts of the estate, neither the heirs nor the insurance company are necessary parties.

2. Where in such suit the mortgage which defendant is ordered to pay is less than the amount of the trust fund held by him, he can not complain that the amount of the mortgage was not properly proven, nor that it was ordered to be paid to the administratrix, to be paid out by her.

3. Where a trust is completed no consideration is necessary.

[Opinion filed August 27, 1890.]

APPEAL from the Circuit Court of Clay County; the Hon. CARROLL C. BOGGS, Judge, presiding.

Mr. RUFUS COPE, for appellant.

Messrs. D. B. MONROE and CHESLEY & BOYLES, for appellee.

PHILLIPS, J. Appellee filed her bill alleging Lyman T. Bonny died December 15, 1887, leaving surviving his widow, mother, brothers and sisters, as heirs, and that the complainant, his widow, was appointed his administratrix. At the time of his death he was seized of certain lands described, which were subject to a mortgage given by the intestate, to secure certain notes made by him, payable to the "Ætna Life Insurance Company." That the mortgaged premises were occupied as a homestead, and that the mortgage debt is due and unpaid. Bill further alleges that on December 16, 1885, the intestate procured an insurance on his life from the "Bloomington Mutual Benefit Association,"

payable to John R. Bonny, and at the time of procuring said policy, the said John R. Bonny agreed that he would pay the premiums on said policy, and in the event of the death of Lyman would, from the money arising from the said policy, pay the debts of said Lyman remaining at his death, including the mortgage indebtedness, to the extent of the money so received on said policy, less the premiums paid by John R. Bonny, with legal interest thereon.

It is further alleged that in July, 1888, the appellant received on said policy \$2,836.24, and from the proceeds paid two debts of Lyman amounting to \$750. The bill further charges that during the illness of Lyman the appellant took from the premises certain described property worth \$420 and converted it to his own use. The bill alleges that said insurance is a trust fund for the benefit of the estate and to pay the debts of said estate intended to be so applied and asks an account. The answer admits the issuing of the policy payable to the defendant, but denies that it was to be held in trust as alleged, and avers the payment of premiums by defendant and denies that Lyman paid any premiums and denies all other matters in the bill alleged. The evidence shows the receipt by the defendant of \$2,836.24 and that he has paid for the indebtedness of Lyman and funeral expenses and premiums, money to the amount of about \$1,850, and that the amount of indebtedness mentioned in the bill, secured by mortgage on the premises, is due and unpaid.

The evidence shows admissions of John R. Bonny in reference to the debt mentioned in the mortgage. He stated to the agent of the Aetna Insurance Company, that his brother's life was insured, and that he, John R. Bonny, was paying the premiums, and if his brother died he expected to pay off the debts with the insurance. Cameron McKnight testifies that on the day of Lyman's death he asked John R. Bonny how Lyman's financial matters were and John R. Bonny replied, "All right, he left an insurance policy that will square his debts all up;" he further said when the mortgage was referred to that "he was to pay the debts; that the insurance policy would just about pay the debts all off." John Erwin testifies that John

Bonny v. Bonny.

R. Bonny said in speaking of the mortgage indebtedness, "that if he got the money out of the policy he would pay the mortgage."

In a letter to the insurance company after the death of his brother, John R. Bonny says: "Ever since I have been identified with the Bloomington Life Insurance Company, I have endeavored to get brother to make application for membership, as he was rapidly failing in business, and I was his heavy indorser. I thought it was wise to be on the safe side, but he always declined, saying he was not able, and it was not until the first week in November, 1885, that I got his consent to make application, and it was all to be at my expense, and in the event of his financial success, he was to reimburse me for all money paid out." And in a subsequent letter to the same company, he said: "Owing to the bad state of affairs of my brother's estate, and my heavy responsibility as security, I hope the claim can be admitted at once, and assessed for January." The court entered a decree finding the amount due on the mortgage and interest to be \$557.76, and finding that said funds derived from the insurance to the amount of \$2,836.24 was a trust fund, and ordering John R. Bonny to pay complainant the sum of \$557.76, to be used for the payment of said mortgage, from which decree the defendant appeals to this court.

It is insisted that as neither the heirs nor the insurance company are made parties, the decree can not be sustained, and that the administratrix had no duty with reference to said fund. If the money derived from the insurance was held by the defendant in trust for the estate of the deceased, neither the heirs nor creditors are necessary parties, but such fund belonging to the estate should pass into the hands of the administratrix. The evidence clearly warrants the finding made in the decree, that John R. Bonny received the money derived from the insurance in trust. The duty of the administratrix to collect the assets of the estate is required by law. Such assets are primarily liable for the debts of the estate. And in a proceeding for collection of debts, creditors of the estate and heirs not indebted to the estate are not proper parties.

It is urged, however, that to fix the amount of the mortgage the mortgagee is a necessary party, that the note may be produced.

The money in the hands of the defendant as a trust fund may be recovered by the administratrix without reference to any particular debt, and while in the decree the court finds the amount of the mortgage and note, yet it is apparent from an inspection of the evidence in the record, it would have warranted a decree for a much larger sum as money due the estate. And the primary object of the bill being to declare the trust and pay off the mortgage indebtedness, there could be no liability for a greater amount than the money in his hands as a trust fund, and the amount decreed to be paid by the defendant not exceeding the amount in his hands, as shown by the evidence, he can not complain of the want of the production of the notes owing by the intestate to the insurance company. It is further objected, that as the decree directs the payment of the money to the administratrix, to be used by her as a specific fund for the payment of the mortgage, that the decree makes her a trustee, in her representative capacity, of a fund never intended to pass to her hands. The administratrix having a right to collect indebtedness due the estate, and the payment of the same so decreed being a discharge from liability for further payment to any one by the defendant, he can not be heard to complain of the manner in which the sum so collected from him in this proceeding is to be disposed of. It is insisted that no consideration is shown if this trust rests on a contract between the parties. This defendant, according to the declarations made in his letter, in the event of the financial success of his brother, was to be reimbursed for all money paid out. When he procured the money on the insurance policy he was reimbursed for all money paid out, and entered upon the discharge of the trust, and is estopped from denying that he is a trustee, and the trust is completed; and where completed a consideration is not necessary. *Massey et al. v. Huntington*, 118 Ill. 80. Finding no error in the record the decree is affirmed.

Decree affirmed.

SCHOOL DISTRICT NO. 4

v.

HANNAH STILLEY.

Master and Servant—Contract with Teacher—Unlawful Discharge—Recovery of Wages—Evidence—Damages—Schools.

1. One who at the time she signs a contract with the board of directors of a school district to teach, has a certificate from the county superintendent, can recover on the contract, though at the time of her application to the board, and the date of the contract, she had no certificate.
2. The date on the face of a contract is not even conclusive against the parties to it.
3. Where a school board discharges a teacher without cause, she may recover the amount of her wages according to her contract, unless it is shown that during the time she could have procured similar employment, the burden of proving which is on the board.

[Opinion filed August 27, 1890.]

APPEAL from the County Court of Williamson County;
the Hon. W. W. DUNCAN, Judge, presiding.

On May 10, 1888, the board of directors of District 4, T. 10 S., R. 3 E., held a meeting for the purpose of employing teachers. Appellee solicited employment as a teacher. In acting on applications for employment the board determined to employ appellee and gave her notice of her employment. As testified to by one of the directors, "the board agreed to and did hire Miss Hannah Stilley, and ordered that the contract be reduced to writing and signed by her. The clerk was ordered at the meeting to prepare the contract, which was done on that day. I was then and there selected by the board to inform the plaintiff, Miss Stilley, of the fact that her proposition had been accepted, and she hired as one of the teachers. I saw her the same evening, May 10th, and gave her notice of her employment, and that she would be required to sign a written contract, and the contract was in the hands of the clerk."

At the time of the meeting on the 10th of May, appellee had no certificate from the county superintendent. On the 25th of May a certificate was issued to her, and in July or August she appeared before the clerk, read, and signed the contract prepared by order of the board. The contract, though signed in July or August, was dated May 10th. By the terms of the written contract, the time of the commencement of the school, the term school was to be kept, the duties the teacher was to discharge and the price to be paid, were stated. At the time school was to open appellee appeared, entered upon and discharged the duties of teacher about two weeks, when she became ill and solicited permission of the directors to furnish a substitute, named, until her health was restored, which was assented to. On her recovery, a week or two thereafter, she returned to resume her duties, and was notified she was discharged and would not be permitted to teach. She brought suit to recover her wages, and on trial verdict and judgment was entered in favor of plaintiff. The only question presented by the assignment of errors and on argument, is as to the right of recovery under this contract, not having a certificate on May 10th, but having one on May 25th, and the contract, though signed in July or August, dated May 10th.

Mr. WM. A. SPANN, for appellant.

Mr. JOSEPH W. HARTWELL, for appellee.

PHILLIPS, J. The proposition of appellee soliciting employment at the meeting of the board on May 10th was accepted, conditioned that she should sign a written contract, to be prepared by the clerk of the board, and which was then prepared. Of this appellee had notice. The contract so written was the proposition of the board, to which her assent was required before the contract was consummated.

At the time she assented to that proposition and signed the contract she held a teacher's certificate. The contract, though dated May 10th, was not consummated until July or August

Ragland v. McFall.

as shown by the evidence, and was not entered into until that time. All prior propositions were superseded by the written agreement. *Longfellow v. Moore*, 102 Ill. 289. The date appearing on the face of the contract is not conclusive even against the parties to it. *Baldwin v. Freydendall*, 10 Ill. App. 106. Holding a teacher's certificate at the time of accepting their proposition and contracting with them in writing, the contract was valid and binding on the directors, and in discharging her without cause they became liable for the amount of her wages according to the contract, unless it be shown she could during the time have procured work of a similar character. And to show this fact was incumbent on them to reduce the amount to be recovered. *Brown v. Board of Education*, 29 Ill. App. 572. Finding no error in the record the judgment is affirmed.

Judgment affirmed.

36	135
137*	81

JOHN RAGLAND, SHERIFF,

v.

LOUISA S. MCFALL. ¶

Replevin—Wife's Separate Property—Sale—Evidence—Corporations.

1. Where there is a question whether money paid by the wife was her separate property or her husband's, it is competent to show that she had borrowed from a third person similar amounts on her own credit.

2. Though the property is covered by a chattel mortgage, a surrender by the parties thereto by way of sale and delivery of possession to pay a subsisting debt, without actual or intended fraud, is valid.

3. Where the officers and stockholders of a corporation acquiesce in a sale and transfer by the president of all the assets of the corporation for a debt, they can not, in the absence of fraud, question the president's power to make it; nor does a subsequent judgment creditor of the corporation, with notice, occupy a better position.

[Opinion filed August 27, 1890.]

APPEAL from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

Mr. M. MILLARD, for appellant.

Mr. GEO. B. BURNETT, for appellee.

PHILLIPS, J. On December 24, 1887, appellant, as sheriff of St. Clair county, by virtue of an execution in favor of P. P. Manion, levied on certain property as the property of the River Rendering Company. Appellee brought her action of replevin to recover the property, and to her declaration appellant filed pleas of *non detinet* property in himself and property in the River Rendering Company. Issue was joined on these pleas and trial resulted in a verdict and judgment of property in appellee. It appears from the evidence in this record that appellee held notes of the River Rendering Company, one for \$5,500, one for \$4,500, one for \$8,860, and one for \$3,500, which were made by the company for money loaned and money paid by appellee as security. The plaintiff in the replevin suit based her right to recover on evidence that in 1882, after certain of the above notes became due, the company, being unable to pay the same, surrendered to her certain property, including the property in controversy, in satisfaction and payment of her debt, and that she occupied and took possession of the same, and has remained in possession from that time, October 22, 1882, to the time of the levy of the execution. And that such possession was held by virtue of such acceptance of said property in satisfaction of the said indebtedness. The president of the River Rendering Company was the husband of the plaintiff, and he, with the secretary of the company, were substantially the owners of all the stock of the company. The plaintiff called as a witness one Richards, to prove that she had at various times borrowed money from him, and the amount of such loans and the date were testified to by him. From this evidence it appears that some of these loans in amount and date were of about the same date and amount as certain of the loans made by plaintiff to the River Rendering Company. This testimony was objected to by defendant and the objection overruled, and that ruling of the court is assigned as error. The fact of the exist-

ence of the indebtedness and the amount of the same were material questions to be determined.

These transactions between the plaintiff and the company, represented by its president, her husband, were of such a nature that it was also material to show the plaintiff was possessed of a separate estate, and had the control of large sums of money. Requiring large sums of money from Richards on her own credit would tend to prove these facts. It was not error to overrule the objection to the introduction of the testimony of Richards. That the plaintiff, the wife of the president of the company, was possessed of a separate estate in her own right, and had the control of large sums of money, and that this indebtedness from the company to her existed, is clearly shown from the evidence in this record. Whether the property belonging to the River Rendering Company was surrendered up to the plaintiff in payment and satisfaction of this debt, and so accepted by her, and possession entered into by her on such surrender and acceptance, are material questions in determining the correctness of the verdict. While on that question there is some conflict in the evidence, the clear preponderance is with the plaintiff, this being the theory on which plaintiff bases her claim to the property in controversy, and the evidence on which her claim is based. The defendant sought to introduce in evidence a deed of trust, made and acknowledged and recorded in the State of Missouri, and recorded in St. Clair county, Illinois, by which this property was conveyed by the River Rendering Company to Richards, in trust, to secure the indebtedness due from the company to plaintiff, prior to the maturity of the notes, and before such surrender.

The existence of such a deed was shown in the cross-examination of plaintiff, and Richards and the defendant sought to introduce that deed of date April 6, 1882, in evidence, and produced and offered the same to the jury. To the introduction of this deed in evidence the plaintiff objected, which objection was sustained, to which the defendant excepted. The defendant further offered in evidence the trustee's advertisement of a sale, to take place under said deed of trust, which

sale was advertised to take place on the 7th day of January, 1888, and a trustee's deed made on that date by the trustee Richards, conveying this property to the plaintiff, dated January 7, 1888, which notice of sale and trustee's deed were produced and offered. To the introduction of this testimony the plaintiff objected, which objections were sustained by the court, and to these rulings of the court the defendant excepted, and assigns as error the exclusion of the deed of trust, notice, and trustee's deed so offered. The property in controversy being chattel property, if it be conceded that the deed of trust acknowledged in Missouri would not create a lien on this property, which would be good against the execution in the hands of the sheriff and so levied, and if it be further conceded that that deed was fraudulent on its face, yet that would not preclude the parties to that instrument from making a valid and binding contract in reference to the property; and a surrender of the property by way of sale and a delivery of possession to pay a subsisting debt without actual or intended fraud would be valid. *Stewart et al. v. Dunham et al.*, 115 U. S. 61, is directly in point.

The plaintiff having based her claim on such surrender and possession, this offer of the deed of trust by the defendant did not tend to disprove any of the testimony offered by plaintiff to show the surrender and possession as claimed by her. Its introduction would have been misleading. It was not error to sustain the objection to that testimony.

It is further insisted that the president of the company had no power to convey its entire property and assets, and that an attempt to do so would be inoperative and fraudulent. Without entering into a consideration of the power of the president of a company in this respect, it is sufficient to say that from the evidence in this record it appears that the indebtedness from the company to the plaintiff was over \$23,000, and the value of the property of the River Rendering Company, at the time of the surrender of the same to her in satisfaction of her debt, did not exceed \$10,000. The stock of the company was, as appears from this evidence, substantially all held by the president, secretary and superintendent. The

plaintiff, after entering into possession, operated the factory, and that she was so operating and in possession of the factory and claiming ownership of the same, was known to the officers and stockholders.

The superintendent entered into her employ while she was so operating the factory, as did also the president of the company. The secretary had notice of these facts, and with that notice there was acquiescence, without objection, for more than five years. The plaintiff expended money in improvements and repairs, of which there was notice; such stockholders or officers of the company, with such notice, so standing silently by for such a length of time, will not be heard to question the transfer, on the ground of the want of power. Can this judgment creditor, who had, as appears from this evidence, the same knowledge, and who contracted with plaintiff in reference to repairs on this factory, and was paid by her individually, and who, because of the insolvency of the company, importuned her to pay his debt, occupy a different position? His judgment, as appears from this evidence, was recovered more than four years and ten months after this possession was entered into by the plaintiff. Under these facts it was not error to refuse the second instruction asked by defendant, which was as follows: "The jury are instructed that, under the evidence in the case, McFall, as president of the company, had no right to turn over or deliver to his wife the property in question, in satisfaction of her debt, and the verdict should be for defendant;" which refusal to give such instruction is assigned as error. No fraud, actual or intended is proven, and if the officers and stockholders of the company have so acted with reference to the matter, that they be held bound by the transfer, the defendant nor the judgment creditors could not be in a better position to deny that want of power, in the absence of fraud, actual or constructive. The instruction given for plaintiff, which is assigned as error, correctly states the law as here discussed. Finding no error in the record the judgment is affirmed.

Judgment affirmed.

JAMES G. BROWN AND HAMILTON DAUGHADAY
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Railroads—Injury by Fire While in Transportation—Limitation of Liability—Power of Consignor to Bind Consignee—Agency.

1. In an action against a railroad company for loss of goods by fire while in transportation, it will be assumed that special rates were given in consideration of an exemption from the common law liability contained in the bill of lading issued in another State, unless want of consideration is proven.

2. The consignor being, under the laws of New York, the agent of the consignee in shipping goods and receiving bills of lading therefor, the consignee who sues in this State is bound by an agreement in a through bill of lading issued to the consignor in New York, that none of the connecting lines over which the goods are to be transported shall be liable for their loss by fire while in transportation.

3. A clause in a bill of lading issued to a consignor in another State consigned to a person in St. Louis, that no carrier shall be liable from loss by fire from any cause, on land or water, or that no carrier shall be liable for loss by fire while the goods are awaiting transshipment at any port, releases a carrier from liability for such loss while the goods are awaiting transshipment to St. Louis in its depot at East St. Louis.

4. General authority given by a consignee to the consignor to deliver goods to a carrier for transportation includes the power to stipulate for the terms of transportation and accept a bill of lading containing exemptions from liability.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. GEO. W. WALL, Judge, presiding.

Appellants brought three suits against appellee to recover the value of four cases of quilts bought by appellants in New York, five bales of sheeting bought in Evansville, Indiana, and twelve bales of domestics bought in Columbus, Georgia. These goods were shipped from the several places by the several vendors as consignors and were consigned to appel-

lants at St. Louis, Missouri, and a through bill of lading was delivered to each of the several shippers at the time the goods were received for transportation. The goods were destroyed by fire, without fault or negligence of appellee, in its freight depot at East St. Louis, the terminus of its line, while awaiting transfer from said freight depot to St. Louis via the St. Louis Bridge and Tunnel Company, in accordance with the written orders appellants had previously given appellee to ship all freight received for them by that line and not by the St. Louis Transfer Company. At the trial it was admitted that the consignors mentioned in each of said bills of lading were, and still are, large and frequent shippers of freight over the respective lines issuing and delivering said bills of lading and over the various lines of transportation connecting therewith. That each of said consignors was always in the habit, as such shipper and consignor, for a long period of time immediately preceding the dates of the respective bills of lading in evidence, of receiving from the same carriers respectively issuing and delivering to them and each of them said bills of lading, similar bills of lading containing printed therein the very same terms and conditions in every respect as are contained in the respective bills of lading made and delivered by said respective carriers to said N. B. Clafflin & Co., Mackey, Nisbet & Co. and the Eagle & Phenix Manufacturing Co., for the goods in controversy in this case.

That said consignors, nor any or either of them, ever made any objection to any of said terms and conditions contained in said bills of lading, but received the same during all of said time without objection or complaint. That said consignors, and each and all of them, made no objection whatever to any of the terms or conditions contained in any of the bills of lading in this case when the same were delivered to each of them by said respective carriers, but received the same without objection or complaint. The bill of lading for the transportation of the goods from New York is headed, "Kanawha Dispatch" described in said bill as a "Fast freight line between the West, Northwest and Southwest," "H. W. Carr, Gen'l Eastern Agent, New York." "Operated over Old Dominion

Steamship Co., Merchants and Miners Transportation Co., Chesapeake & Ohio Railway, Chicago, St. Louis & Pittsburg R. R., Virginia Midland R. R., Sciota Valley R. R., Kentucky Central R. R., *Louisville & Nashville R. R.* (*St. Louis* division), Louisville, Cincinnati & Lexington R. R., Chesapeake, Ohio & Southwestern R. R., Louisville, Evansville & St. Louis R. R." Dated New York, January 14 to 16, 1886; stating the receipt by Old Dominion Steamship Co. of B. Clafflin & Co. under the contract thereafter contained of the property mentioned below (including the New York goods in controversy) marked and numbered as per margin. In the margin appears under head of "marks and numbers," "B. D. & Co., St. Louis Mo." "Brown, Daughaday & Co." "Rates in cases per 100 lbs. from New York to E. St. L., 79 cts." The bill then provides that the freight is to be transported by Steamship Guyandotte, appointed to sail 16th, or by any other succeeding steamer or vessel, to the wharf of the company at Newport News, Va., and there delivered to connecting railroads, or water line, and so on by one connecting line to another until they reach the station or wharf nearest to the ultimate destination.

It further provides: "This bill of lading is signed for the different carriers who may engage in the transportation severally, but not jointly, and each of them is to be bound by and have the benefit of all the provisions thereof, as if signed by it, the shipper, owner and consignee." It further provides: "No carrier, or the property of any, shall be liable for loss or damage arising from any of the following causes, viz.: fire from any cause on land or on water." It further provides: "The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods, to abide by all the stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner and consignee." The bill of lading is signed: "H. W. Carr, General Eastern Agent." The bill of lading for the transportation of the goods shipped from Columbus, Ga., is headed "Mobile and Girard Railroad Company and connections. Through bill of lading," and dated January 16, 1886. The

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Eagle & Phenix Manufacturing Co. is named as consignor, and Brown, Daughaday & Co., St. Louis, Mo., are the consignees. The goods are described and consigned to that firm at that place to be transported from Columbus, Ga., by the Mobile & Girard R. R. Co., and connecting lines, until they reach the station or wharf nearest to the ultimate destination. The word "Released" was stamped upon the face of the bill *by the consignor* and in that condition was presented to the carrier at Columbus to fill up with the weight and rate, and sign, and when so completed was delivered to the consignor. Among the conditions in this bill of lading is this: "No carrier shall be liable for any loss arising from any of the following causes, viz.: Fire from any cause on land or water;" and substantially the same provisions appear, as are above mentioned as appearing in the New York bill of lading. The bill of lading was signed by Williams, G. F. A. The bill of lading for the transportation of the goods shipped from Evansville, Ind., was issued by appellee to Mackey, Nisbet & Co. as consignors, and appellants were named as consignees, and the goods were consigned to them at St. Louis, Mo. Among the other conditions of said bill are the following:

"In accepting this bill of lading, the shipper of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions." "That said Louisville & Nashville Railroad Company * * * shall not be liable for loss or damage to any article carried from the effects of heat or cold, by wet, dirt, fire or loss of weight, * * * nor for loss or damage on any article of property whatever, *by fire or other casualty while in transit or while in depots or places of transshipment.*" By the agreement of plaintiffs and defendant the three causes were consolidated and tried as one by the court. The court found for the defendant and after overruling plaintiff's motion for a new trial, entered judgment on the finding for defendant for costs, to reverse which judgment plaintiffs took this appeal.

Messrs. WISE & DAVIS, for appellants.

On common law questions the courts of this State will pre-

sume the common law to be in force in a sister State. *Crouch v. Hall*, 15 Ill. 263; *Tinkler v. Cox*, 68 Ill. 119.

If, in the State where the contract is made, there exists, as a principle of its common law established by the decision of its courts, a legal presumption arising upon certain acts of parties to a contract which enters as a rule of evidence into their agreement, compelling, or implying from what they do and say, a certain inference or intention, such rule or principle of law will not be applied to the contract in the courts of another State where no such presumption exists, unless, upon the trial, proof of the *lex loci contractus* is made as a fact to be regarded by the court and jury in ascertaining the contract between the parties. A judge is bound to know the statutes and the common law of his own State, but not of another State; and the court will presume that the common law, as established in his own State, is the common law of the State where the contract is made, unless the contrary is proved as a fact. 1 Wharton on Ev. 300; 2 Phillips on Ev. 427, and cases cited in note.

In Illinois the common law rule is that the consignee is not bound by a clause in a bill of lading exempting the carrier from loss by fire unless the evidence shows he gave the consignee authority to accept the same. *Mer. Desp. Trans. Co. v. Joesting et al.*, 89 Ill. 152.

A common carrier can not, by contract, relieve himself from liability for the loss of goods delivered to him for transportation, which loss has been occasioned by his own negligence or that of his agents or servants, or where such negligence has in any degree contributed to the loss—and it matters not what degree of negligence has thus incurred or contributed to the loss. *Mich. Southern & Northern Ind. R. R. Co. v. Heaton*, 37 Ind. 448; *Blackstock v. New York, etc., R. R. Co.*, 20 N. Y. 48; *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500; *Michael v. N. Y. Central R. R. Co.*, 30 N. Y. 564; *Mich., etc., R. R. Co. v. Curtis*, 80 Ill. 324.

Contracts not clear in their meaning, by which the carriers seek to avoid the responsibility which the law imposes upon them, should be construed most strongly against them. *St. L. & S. E. R. R. Co. v. Schinuck et al.*, 49 Ind. 302; *Edsall et al.*

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v. The Camden & Amboy R. R. & T. Co., 50 N. Y. 661;
Menzell v. Railway Co., 1 Dillon U. S. Cir. C. Rep. 531.

Mr. J. M. HAMILL, for appellee.

It is well settled that the place where the contract is made must govern and control its construction and interpretation; and where a bill of lading is given in one State for goods delivered there to the carrier for transportation to another State, where the laws of the two States differ as to the validity or effect of the contract, the law of the State where the contract was made must govern as to the construction of the contract, and as to the extent of the carrier's liability under it. *Milwaukee & St. Paul Ry. Co. v. Smith*, 74 Ill. 197; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Talbot v. Merchants Despatch*, 41 Iowa, 247; *Arnold v. Potter*, 22 Iowa, 194; *Cantu v. Bennett*, 39 Texas, 303; *First National Bank v. Shaw*, 61 New York, 283; *Dike v. Erie Ry. Co.*, 45 New York, 113; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539; *Hutchinson on Carriers*, Secs. 140, 141, 142, 143 and 144; *Wharton on Conflict of Laws*, Sec. 429.

It is the universal law of this country that all common carriers may, by express or special contract, limit their common law liability. *Anchor Line v. Knowles*, 66 Ill. 150; *Merchants Desp. T. Co. v. Moore*, 82 Ill. 136; *W., St. L. & P. Ry. Co. v. Jaggerman*, 115 Ill. 407; *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 New York, 90; *M. S. & N. I. R. R. Co. v. Heaton*, 37 Ind. 448; *The Central Railroad v. Bryant*, 73 Ga. 722; *Hutchinson on Carriers*, Sec. 237.

An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect, and, among other things, the power to stipulate for the terms of transportation. *Nelson v. Hudson River R. R. Co.*, 48 New York, 498; *Shelton v. Merchants Despatch Trans. Co.*, 59 New York, 258; *Wait's Actions and Defences*, 222.

The agent of the owner of goods, with authority to deliver them to the carrier for transportation, is to be presumed to have all the necessary power to carry it into effect; and if it

becomes necessary for him to accept a receipt from the carrier containing conditions as to liability in order to procure the carrier's consent to receive and forward them, the owner becomes bound by his acceptance. And not only has the agent for shipment the authority to deliver the goods and to accept the carrier's receipt, but whenever it becomes his duty to send or forward them, it is his duty also to accept such terms of the carrier as may not be unreasonable, if necessary to procure the acceptance of the goods by him. *Hutchinson on Carriers*, Secs. 265 and 266; *Rawson v. Holland*, 59 N. Y. 611. In *Railroad Company v. Androscoggin Mills*, 22 Wall. 594, the consignee brought suit to recover for the value of the goods which had been destroyed by fire, and it was held to be bound by the clause in the bill of lading exempting the carrier from liability for loss by fire.

At the beginning of the bill of lading issued in New York is given the name of plaintiff's firm, Brown, Daughaday & Co., St. Louis, Mo. In *Maghee v. Camden & Amboy Transportation Co.*, 45 New York, 514, it was decided that "when a railroad company contracted to transport and deliver goods at a point beyond its own line, containing a provision excepting liability from certain specified hazards, the connecting road which received the goods from the contracting road to carry to their destination, was entitled to the benefit of such exception." *Ward v. Saratoga and Schenectady R. R. Co.*, 19 Wend. 534; *Burtis v. Buffalo and State Line R. R. Co.*, 22 New York, 269; *Hutchinson on Carriers*, Secs. 271, 272 and 278; *Nelson & Hudson R. R. Co.*, 48 New York, 508, also 3 Wallace, 107.

But if there was no evidence in the record to show that under the law of New York this bill of lading was a through bill, then the presumption would be that upon this question the common law of New York is the same as the common law of this State, and in this State it has been held ever since the case of the *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 333, that when a carrier receives goods to carry, marked for a particular place, it is bound to carry and deliver at that place, although it be a place beyond its own line, and the con-

tract is necessarily a through contract. Illinois Central R. R. Co. v. Johnson, 34 Ill. 389.

GREEN, J. In the printed argument for appellants the following reasons are urged for reversal: "1. That it has not been proved that by the common law of Indiana and Georgia, the consignor is presumed to have authority to bind the consignee by accepting a bill of lading restricting the carrier's common law liability in the absence of evidence to that effect." "2. The terms of the New York and Georgia bills of lading are not broad enough to cover a loss by fire while awaiting transshipment at a depot." "3. The bills of lading provide for *accidental* delay, while the delay at East St. Louis was *intentional* and without sufficient cause." "4. The New York bill exempts only the first carrier." "5. It shows there was no consideration for the limitation of the carrier's common law liability."

Taking up these reasons in inverse order, it appears by the record that the fifth, fourth, third and second reasons are not supported by the facts. It does not appear by the New York bill of lading, or by either of the other bills, that there was no consideration for the limitation of the carrier's common law liability, and the assumption that because it is not shown the rates for the shipment from New York and Indiana were special rates, there could have been no consideration for such limitation, is one we do not favor, but on the contrary we assume that the consideration of a lower rate for transportation was given for the special exemption from the common law liability, unless the contrary is proven by plaintiffs. The New York bill of lading upon its face is a contract for the transportation of the goods from New York by steamer or vessel to Newport News, Virginia, "and there to be delivered to connecting railroads or water line, and so on by one connecting line to another until they reach the station or wharf nearest to the ultimate destination." The names of the different lines over and upon which the "Kanawha Dispatch" carries freight appear in the bill, and among others that of appellee's road. The names of consignors, the desti-

nation, and the rate of seventy-nine cents to East St. Louis, all appear, and no doubt can arise from an inspection that it is a through bill of lading. **U**t is conceded the proof shows that by the common law of New York the consignor is the agent of the consignee in the shipment of goods, and by receiving bill of lading without objection he thereby binds the consignee to all the conditions thereof.]

The New York bill of lading provides: "The bill of lading is signed for the different carriers who may engage in the transportation severally, but not jointly, and each of them is to be bound by and have the benefit of all the provisions thereof, as if signed by it, the shipper, owner and consignee." It thus appears that appellant as one of the carriers engaged in the transportation of the goods shipped from New York, by the very terms of the contract, is exempted from its common law liability, and said fourth reason for reversal is not tenable.

As to the third reason urged "that the delay at East St. Louis was intentional and without sufficient cause," we do not so find from the evidence. And we further hold that the second reason can not be sustained if the terms of the respective bills of lading from New York and Georgia are fairly construed. In the New York bill it is provided that "*no carrier shall be liable for loss or damage arising from fire, from any cause on land or water.*" This provision is not ambiguous; it covers a loss by fire at defendant's freight depot (the defendant being free from negligence), and by it defendant is absolved from liability for such loss. The exemption clause in the Georgia bill of lading is, "No carrier or the property of any shall be liable for any loss or damage arising from any of the following causes, viz.: Fire from any cause on land or on water, or while awaiting transshipment at any port." And on behalf of appellants it is contended the proper construction of this clause is that "Fire from any cause on land or on water" was not intended to include a loss *by fire* while awaiting transshipment, but to apply only to losses by fire while in transit; that the depot was not a *port*, and although the goods had not yet reached their final destination they were not *in transit* when destroyed.

We can not give such a construction and meaning to this clause.

[The first reason assigned is the one chiefly relied on for reversal, and in regard to it we are satisfied the evidence introduced on the trial below was ample and sufficient to prove that by the common law of Indiana the consignor is presumed to have authority to bind the consignee, by accepting a bill of lading restricting the carrier's common law liability, and in this case appellants were so bound by, and their goods were shipped and transported over appellee's line subject to, the condition that the carrier should not be liable for loss or damage on the said goods by fire, while in transit, or while in depot, or in place of transshipment. Hence, we hold appellee was exempted from liability for the loss of the goods shipped from Indiana, and plaintiffs had no right to recover therefor. The facts concerning the Georgia shipment are, that in St. Louis appellants bought the goods of the agent of the Eagle & Phenix Co., of Columbus, Ga., to be shipped by the vendor from that place to appellants, at St. Louis, but no orders or directions were given by the latter as to the mode of transportation, or terms, or prices that should be paid therefor. The bill of lading was prepared and printed by the consignor, and filled up by it with exception of the weight of the goods and rate for carrying same. The word "Released" was stamped upon the face of the bill, indicating, as was understood by the consignor and the carrier, that in consideration of a special cheap rate charged for the transportation of the goods to their ultimate destination, the carriers engaged therein were released from their common law liability, in accordance with the printed terms of the bill. In this condition, the consignor's agent brought the bill to the first carrier at Columbus, the weight and rate were inserted, and the bill was signed by the agent of the carrier and returned to consignor's agent, and thereupon the goods were shipped consigned to appellants.

It was admitted the Eagle & Phenix Co., which was and had been for several years a large shipper over the several lines by which these goods were carried, received the bill of lading

without objection, and it must have known by its agent the terms and conditions thereof. Waiving the consideration of the question as to the sufficiency of the proof of appellee's exemption from liability at common law, under the facts as held in Georgia, we are satisfied from the evidence that the consignor had implied authority to ship the goods and make the contract for the transportation thereof, as the agent of appellants. A. R. Smith, on behalf of plaintiffs, testified he bought the goods for them of the vendor's agent in St. Louis, Mo.; that "no instructions were given him (the agent) as to the style of bill of lading that he should accept for us, or for the shipment of the goods." With respect to the power of an agent to bind his principal, it is said in Story on Agency, Sec. 85: "In all acts authorized to be done by an agent, whether of a general or special nature, it may be laid down as a universal principle that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency." As a general rule the agent to whom the owner intrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation, *e. g.*, the consignor of the goods, or any other agent of the owner who purchases or procures them for him. Redfield on Carriers, Sec. 52. An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect, and among other things the power to stipulate for the terms of transportation. 1 Wait's Actions and Defences, 222. And as a general rule the authority given to an agent to ship goods carries with it the authority to accept a bill of lading or to make a contract containing exemptions from liability. Lawson on Contracts of Carriers, Sec. 223.

In the case Ill. Cent. R. R. Co. v. Jonte, 13 Ill. App. 424, a contract exempting the carrier from its common law liability was signed by one Chambers, for Jonte, the owner of the goods. In the trial court the contract was not admitted, because no proof was introduced tending to show authority in Chambers to execute it. In the opinion Higbee, J., says: 'The execution by Chambers was not denied, but both he

and Jonte deny his authority to do so. The law does not require express authority to execute such a contract to make it binding on the principal. On the contrary it is often conclusively presumed from the nature of the business the agent is authorized to transact." And further on says, citing authorities: "Hence, the authority to an agent to ship goods with a carrier, includes all the usual and necessary means of carrying it into effect. Such a power can only be exercised by procuring the consent of the carrier. The agent is therefore authorized to contract with him as to the terms of the transportation. He may in the exercise of a reasonable discretion, agree to such terms as he can obtain and shall think for the best interests of his principal provided they are such as are usual in making similar consignments." It was held that under the general rule Jonte was bound by the terms of the contract, and the authorities cited in the opinion sustain that view. We perceive no good reason why the general rule relating to the power of an agent to bind his principal, as announced in the foregoing authorities, should not be applied in this case, [and under the facts proven we have no doubt that appellants were bound by the terms of the Georgia bill of lading exempting appellee from liability for the loss of the goods.]

The consignor was authorized to ship the goods; no orders or directions were given by appellants as to the mode, terms or prices to be paid for transportation, hence to us it appears that in addition to the legal inference of implied authority to make such contract, arising from the relations of appellants and consignor, and the fact that the latter was authorized to ship the goods, the appellants, who were merchants receiving large consignments from various places, and fully acquainted with the methods and manner of contracting for the carrying of merchandise, contemplated and intended to, and did give the consignor authority to make such terms and procure such rates for the transportation of said goods from Columbus, as the latter deemed most advantageous for appellants. And in our judgment, it was not an unreasonable exercise of the discretion so given for the consignor to obtain for its principal

the benefit of cheap rates, by accepting the terms whereby the benefit could be obtained. Bills of lading containing the same terms for the transportation of goods over the same lines had, for a long time prior to this shipment, been received by the same consignors, and the experience doubtless satisfied the shipper that such contracts, whereby cheap rates were obtained, were advantageous to the owner. The case of *Merchants Desp. Trans. Co. v. Joesting et al.*, 89 Ill. 152, cited on behalf of appellants, differs in its facts, and in the evidence of implied authority to the shipper, appearing in this case, but not in that; and the remarks of the judge in the opinion, relied on as announcing a different rule from that which we hold to be the law in this case, in our judgment, do not support such contention. From what we have said, it follows that in our opinion, the judgment of the Circuit Court was right, and the same is affirmed.

Judgment affirmed.

WINFIELD S. JOHNSON

v.

MARY E. JOHNSON.

Divorce—Adultery—Custody of Child—Alimony.

1. In a suit by the wife resulting in a divorce on the ground of adultery it is held that the wife was entitled to the custody of her three-year-old daughter; that a solicitor's fee of \$75 allowed her was not excessive, and that she was properly allowed \$2,000 alimony.

2. While a decree of divorce, giving the wife the custody of her infant child and allowing her alimony, should specify the amount intended for herself and her child respectively, failure to so specify is not reversible error.

[Opinion filed October 8, 1890.]

IN ERROR to the Circuit Court of Perry County; the Hon. BENJ. R. BURROUGHS, Judge, presiding.

Johnson v. Johnson.

MR. BENJAMIN W. POPE, for plaintiff in error.

MR. S. G. PARKS, for defendant in error.

REEVES, J. Defendant in error secured a decree of divorce from plaintiff in error on a charge of adultery. The charge was not denied and no complaint is made that a divorce was granted. The Circuit Court awarded to defendant in error, the care, custody and control of the child of the parties, a girl three years old, and allowed her \$2,000 alimony, to be paid in equal installments in six, twelve, eighteen and twenty-four months. This allowance is the chief ground of complaint against the decree. Four errors are assigned. The first is that the court erred in giving the custody of the child to the mother. The justice and wisdom of this part of the decree is so manifest and so generally sustained by the adjudged cases that we do not feel called upon to notice it further.

The second error assigned is that the court erred in allowing complainant a solicitor's fee of \$75. It is said this allowance was excessive. A sufficient reply to this is that the evidence preserved in the record fully sustains it as a reasonable one and there is no evidence to the contrary. Two witnesses testified that a reasonable fee in the case would be from seventy-five to one hundred dollars and no other evidence was offered. The third error assigned is that the court erred in decreeing \$2,000 to the complainant as alimony. Undoubtedly, unless special reason to the contrary exists, the better mode of granting alimony is by an annual allowance, but in this case alimony in bulk was allowed by the agreement of the parties. In determining the amount of an award of alimony a number of things are proper to be considered. The character of the cause for which the divorce is granted is one. The more serious the offense upon which the divorce is granted, the stronger the case of the injured wife appeals for liberal alimony. The ability of the parties physically to provide support is another consideration. The social position and standing of the parties in the community

where the parties live is to be considered in determining the amount of the allowance to the wife. *Foot v. Foot*, 22 Ill. 425. The innocent party should not be left to suffer pecuniarily for having been compelled by the conduct of the other to seek a divorce. *Mussing v. Mussing*, 104 Ill. 126. The amount of the property and income of the husband is, perhaps, the most controlling consideration, still, the fact that the husband has no property or fixed income does not cut off the wife's right to have an allowance of alimony. *Parker v. Parker*, 61 Ill. 372. In this case the cause for which the divorce was granted was of the gravest character. It is the only cause which is regarded as furnishing a scriptural ground for divorce. It is sufficient to sustain a decree of divorce even though the party charging and proving it, may have been guilty of the other statutory grounds for divorce. *Bast v. Bast*, 82 Ill. 584.

Again, these parties are not equal, physically, to provide for their support. The wife is shown not to be in vigorous health. The husband, while claiming that his wife usually had good health, testified that she had borne him six children. She is one year his senior, being thirty-nine, and he thirty-eight. These people were in good standing in the community, living in a well furnished house and moving in the best society. He was a successful merchant, and both members of a church. The marriage relation having been terminated by no fault of the wife, she ought not be made to suffer pecuniarily. *Mussing v. Mussing*, *supra*. The decree finds that plaintiff in error had property of the value of \$4,250, after deducting his indebtedness, and not including his interest in his father's estate, that would come into his possession after his mother's death, and not including his cash on hand and certain notes and accounts. The evidence would fairly have supported a finding that the plaintiff in error was worth, including his expectancy from his father's estate, \$6,000, over and above his debts, and we think \$2,000 a fair and reasonable allowance to the wife. The interest on this sum would not pay the board of the wife and child, leaving the balance of board and all other expenses of living to be provided by her labor.

Cooper v. Payne.

Lastly it is urged as a ground of reversal of the decree that it does not provide for the support of the minor child. The wife by asking and assuming the care and custody of the child assumed the duty and obligation of its support. By accepting the provisions made for her by the decree, that amount included all she was entitled to from her husband. She having asked for and received the care and the custody of the child, she is bound for its support. *Dawson v. Dawson*, 110 Ill. 279. Where an allowance is made to the wife for the support of herself and child, it would be the better practice to specify the amount allowed the wife for her personal support and the amount allowed her for the support of the child, but a failure to do so we do not deem such an error as should reverse the decree. Finding no sufficient reason for the reversal of the decree it is affirmed.

Decree affirmed.

JAMES W. COOPER

v.

A. C. PAYNE.

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76	365

Exemptions—Execution—Schedule—Want of Signature.

Where the officer levying an execution receives from the debtor a schedule of his property, swears him to it, and carries it away, he can not afterward question its validity for want of the debtor's signature thereto.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of Fayette County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. JOHN A. BINGHAM, for appellant.

Messrs. FARMER & BROWN, for appellee.

REEVES, J. The Phoenix Insurance Company obtained a judgment before a justice of the peace against appellee upon which an execution was issued and placed in the hands of

appellant, a constable. The execution was served upon appellee by appellant on the 12th day of December, 1889. At this time appellee notified the constable that he wanted to schedule his property under the exemption statute and asked the constable for a blank schedule. The constable told him that he had no blanks for that purpose and that it was not his duty to carry blanks of that kind. Appellee then told the constable he would arrange to make a schedule, and four days after demand upon the execution he made a schedule of all his property and delivered the same to appellant, whereupon the constable swore appellee to the schedule and added his *jurat* to the same in these words, to wit:

“Sworn to before me this 16th day of December, 1889.

“JAMES W. COOPER, Constable.”

Appellee did not sign the schedule; his name, however, was used in the body of the schedule, showing that it was made by him of his property. The constable accepted the schedule, and took it away with him, but took no steps to have the property described in the schedule appraised, nor did he give appellee any opportunity to make his selection from the property described in the schedule. The property described in the schedule was agreed to be less than \$400 in value, and that appellee was at the time the head of a family, residing with the same in Fayette county. On the 26th day of December, 1889, the constable returned to appellee, and told him that he had not signed the schedule. He then offered to sign his name to the schedule, which the constable refused to permit him to do, but levied the execution on one bay mare, which was described in the schedule. Appellee sued out a writ of replevin and recovered the mare, and upon a trial in the Circuit Court, upon the foregoing state of facts agreed to by the parties, judgment was given for appellee. The trial court found that the schedule was a good and sufficient schedule. This finding presents the only question that seems to us to arise upon the record. The contention of appellant is that as the statute requires the schedule to be signed by the execution debtor, and as the schedule was not so signed, it was not such a schedule as

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required the constable to regard it. We have already held that a literal compliance with the statute is not to be enforced. Such a rule would frequently deprive the execution debtor's family of the benefit which the Legislature intended to provide. In most cases these schedules are prepared by persons not accustomed to legal forms, and to enforce a literal compliance with all the terms of the statute would operate to defeat the very purpose had in view in the enactment of the statute. A substantial compliance with the statute is all that should be required. *Schuman v. Pilcher*, 36 Ill. App. 43. In this case the schedule was presented to the constable and he swore appellee to it and attached his *jurat*. He then took the schedule and carried it away. To hold that the constable under these circumstances could ignore the schedule and proceed as if none had been made and delivered to him would be to justify and approve a palpable fraud on the part of the constable. This we must decline to do. It is the duty of a constable when a schedule is presented to him to see that it is in the statutory form and if it is not to decline to receive it. Certainly, when he is presented with a schedule and proceeds to swear the execution debtor to it and receives it so sworn to, he can not be heard afterward to question it on account of some formal defect which could have been instantly remedied had he called attention to it.

It is no part of the duty of a constable acting under the exemption statute to set a trap to catch a debtor who is honestly and in good faith seeking to avail himself of the benefit of the statute. *Langston v. Murphy*, 31 Ill. App. 188.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE CITY OF MURPHYSBORO
v.
JANE O'RILEY.

*Municipal Corporations—Personal Injuries—Defective Sidewalk—
Notice—Evidence.*

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City of Murphysboro v. O'Riley.

1. When a city has notice, either actual or constructive, of a defect in a sidewalk, it is its duty to see that it is made reasonably safe.

2. In an action against a city for personal injuries sustained by reason of a defective sidewalk, proof that the walk was dangerous or unsafe is sufficient to render the city liable, without proof of notice to the city, before the injury, that the defect made the walk dangerous.

3. In this action, it is held that the evidence warranted the jury in finding that the defect in the sidewalk existed a sufficient time to charge the city with constructive notice.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of Jackson County; the Hon. O. A. HARKER, Judge, presiding.

Messrs. A. B. GARRETT, City Attorney, HILL & MARTIN, and C. H. SUNDMACHER, for appellant.

This was a suit to recover for an alleged injury to the plaintiff by falling on the sidewalk in Murphysboro, an incorporated city under the general laws of the State.

It appears from the evidence that at the place where she received her injury the walk was practically new and in good repair; that the defect complained of was a broken plank near the outer edge of the walk, which, from the evidence, had not existed more than two or three days prior to the injury, and that the city had no notice whatever of such defect, prior to such injury. Such being the case, instructions Nos. 1 and 2, which were refused, should have been given, as in our opinion they correctly present the rule of the law that where a sidewalk is out of repair, before the city can be made liable for injuries received by reason of such defect, it must have notice thereof. *Chicago v. Stearns*, 106 Ill. 554; *Pana v. French*, 55 Ill. 318; *Chicago v. Murphy*, 48 Ill. 224; *City of Joliet v. Walker*, 7 Ill. App. 267.

Messrs. SMITH, McELVAIN & HERBERT, for appellee.

"The question of notice and negligence on the part of appellant as well as appellee, was a question entirely for the jury." *Joliet v. Walker*, 7 Ill. App. 270.

The jury having solved that question in favor of appellee, a much larger amount as damages would have been sustained,

under the facts in this case. Two hundred and fifty dollars is small compensation for the injury proven.

The two instructions refused to appellant are so defective that no one can seriously contend for them. There are two fatal objections to the first one:

1st. It would convey to the jury the impression that no recovery could be had unless the city had actual notice of the defect, whereas actual notice is not necessary. *Chicago v. Fowler*, 60 Ill. 322.

The city is chargeable with notice if the defect existed for such a length of time as that it might have been known by the exercise of diligence. *Ibid*.

What length of time would be sufficient to charge a municipal corporation with notice of a defect in a street or sidewalk, is a question of fact to be determined by the jury. *Chicago v. McCulloch*, 10 Ill. App. 459; *Chicago v. Dignan*, 14 Ill. App. 128.

2d. Neither was it proper to instruct the jury that the plaintiff must prove the city had notice of the "dangerous character of the defect." There must be notice of the dangerous character of a defect when it is of such a nature as to not cause a reasonably prudent man to suspect it to be dangerous, or if the defect is of such a nature as to not put him on inquiry. But where the defect is exposed as this was to public view, and was so patent, the instruction was erroneous. *Joliet v. Walker*, 7 Ill. App. 267.

REEVES, J. Appellee sustained an injury upon a sidewalk of appellant, on account of which she recovered a judgment in the Circuit Court for \$250. Appellant seeks a reversal of the judgment, first, because the trial court refused two instructions asked by it. They were: "1st. In order to make the city liable for injuries caused by defective sidewalks it devolves upon the plaintiff to prove by a preponderance of the evidence that the city not only had notice of the defect, but the plaintiff must further show that the city had notice of the dangerous character of the defect, and that the plaintiff used ordinary care." "2d. The fact that plaintiff was injured by

falling on the sidewalk is not conclusive evidence that the city is liable for such injury, but before she can recover it must appear from the preponderance of the evidence that she was herself using reasonable care and precaution for her own safety, and that the city failed to use ordinary care; and if it is shown from the evidence that the sidewalk was defective it must further appear that the city had notice of such defect in time to repair the same." The objection to these instructions is that, as framed, they might lead the jury to believe that actual notice of the defect in the sidewalk to the city must be shown.

The first instruction would imply that the city was entitled not only to notice that the defect existed, but that it was dangerous. We take it that when the city had notice, either actual or constructive, of the existence of the defect, it became the duty of the city to look after it, and proof upon the trial that it was a dangerous or unsafe walk was sufficient, without proof of notice to the city before the injury, that the defect was such a one as rendered the walk unsafe. It is the duty of the city to see that its sidewalks are kept in a reasonable state of repair as to safety for persons using the same, and notice, either actual or constructive, of a defect in a sidewalk, is sufficient to put the city authorities upon inquiry as to whether the walk is reasonably safe for use or not.

Again, it is insisted that the evidence does not show that the appellant had either actual or constructive notice of the defect in the sidewalk which caused appellee's injury. The street upon which the sidewalk was laid is the most public street in the city, leading from the public square to three depots, and was used as much as any walk in the city, one witness says used more than any other except the one on the public square.

The walk was comparatively a new walk. The hole in the walk where appellee was hurt was caused by one of the planks breaking down and was about six inches deep and the width of the plank eight inches. Appellee was injured on Saturday night. One witness swears that he saw the hole in the walk on Thursday before the accident, another three or four days before the injury.

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Another says that he noticed the break in the walk a week before the accident to Mrs. O'Riley. M'Ginnis testified that he stepped into the hole on Thursday morning before daylight, previous to the accident to Mrs. O'Riley. On the part of the defense it was shown by one witness that she saw a horse break the walk on Friday morning before Mrs. O'Riley's injury and by other witnesses that they did not notice the hole in the sidewalk until Friday before the accident. If the jury believed the witnesses who testified to seeing the hole in the walk a week before the accident to Mrs. O'Riley and the witness M'Ginnis, who testified that he stepped into the hole Thursday morning before, this testimony, taken in connection with the proof that this walk was used more than any other walk in the city save one on the public square, would seem sufficient to warrant the jury in finding that the defect existed a sufficient length of time before the injury to charge the city with constructive notice of the defect. The question of notice by lapse of time was fairly left to the jury and they have found in favor of appellee, and we can not say they erred in so finding. *City of Chicago v. Fowler*, 60 Ill. 322.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

JOHN W. KELLUMS

v.

EDWARD H. HAWKINS.

Mortgages—Description—Mistake—Estoppel.

Where a vendee, with knowledge of a mortgage, and that it was intended to cover the land purchased, promises to pay it in consideration of the mortgagee's allowing him to purchase, he can not afterward refuse to pay it on the ground that it does not in fact, by its description, cover the land.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of Clay County; the Hon. Wm. C. Jones, Judge, presiding.

Mr. GERSHOM A. HOFF, for appellant.

Messrs. BARNES & RAMSEY, for appellee.

REEVES, J. George B. Marsh borrowed of appellee \$100 and gave his note secured by a mortgage on his house and lot in Flora, as appellee supposed. It turned out that the description in the mortgage did not cover the house and lot. Some time after the loan, appellee went to Flora and Marsh proposed to sell him his place, telling him there was a prior mortgage on the place to the building association of \$400, appellee's debt and a debt to a Mr. Young, which he wanted to pay, and the balance of the price he fixed on the place he wanted for himself, to enable him to get away from the town. Appellee took the proposition under consideration and agreed to let Marsh know what he would do.

Before appellee left Flora he met appellant, who asked whether he had made a trade with Marsh, and in reply appellee told him what had taken place between him and Marsh. Appellant then informed appellee that Marsh was owing him, or that he had security debts to pay for Marsh, and if he could so arrange it he would like to buy the property himself to save himself, but he feared he could not do so, if Marsh thought he could sell the place to appellee. Appellee swears that appellant then said to him, "if you will step down and out of the trade with Marsh, I will pay you the \$100 Marsh owes you." It appears that appellant knew of the mortgage to appellee and spoke of it in this conversation. Appellee further testifies that he said to appellant it was simply a business matter with him, that all he wanted was his money and that he would think about it, and if he concluded to accept appellant's offer he would let him know by mail and he could take the property. The next day appellee wrote appellant that he had concluded not to buy Marsh's place and he could sell to any one else who would

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buy. Thereupon appellant bought the property and finding that the description in appellee's mortgage did not cover the property, he settled in full with Marsh for the place and refused to pay appellee his debt. This suit was brought to recover the amount of this debt. Richey, a witness for plaintiff, testified in substance that appellant told him to communicate with appellee and to say if appellee would get out of the way in the trade for the Marsh property, he would pay appellee his claim, \$100, and that he did so communicate to appellee. Mrs. Marsh testified that at the time the deed was made by Marsh and wife to appellant he promised to pay \$100 to appellee. Appellant claims that what he said to appellee and Richey was that he would pay appellee's mortgage if he had one, and that when he found that the description in appellee's mortgage did not describe the lot by the right number, and so did not cover the property, he did not regard himself under any obligation to pay appellee's claim, and settled in full with Marsh for the amount he agreed to pay him.

. It is clear that appellee could have corrected his mortgage as to description, and have enforced it against the property. So far as appears, Marsh owned no other property than that sold by him to appellant. The mortgage to appellee was made subject to a mortgage to the loan association for \$400, and it was not disputed that this latter mortgage covered the right lot. Appellant had notice of the existence of the mortgage, and that it was intended to cover the lot Marsh owned. From the evidence in the case it appears that in consideration of appellee's retiring from any further negotiation with Marsh in reference to the purchase of the house and lot, and thus giving appellant an opportunity to secure himself on account of his surety obligations for Marsh, appellant agreed to pay appellee his debt due from Marsh.

The preponderance of the evidence shows this. The facts disclosed a sufficient consideration for appellant's promise. The instruction given for plaintiff was a proper one, and no damaging error was committed in the admission of evidence.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

AUGUST WEGENER
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

*Parent and Child—Excessive Punishment of Child—Jurisdiction—
Evidence—Assault and Battery.*

1. A justice of the peace has jurisdiction of a prosecution for unlawfully assaulting, beating and striking a child under twelve years old, and thereby injuring her in health and limb, such offense being an assault and battery.

2. Though the complaint of such offense alleges its commission on a certain day, proof of its commission on other days is admissible.

3. In this case, it is held that the jury were warranted in finding the defendant guilty of inflicting unreasonable and excessive punishment on his adopted child.

[Opinion filed October 8, 1890.]

APPEAL from the Circuit Court of Randolph County; the
Hon. BENJ. R. BURROUGHS, Judge, presiding.

Mr. WM. H. HARTZELL, for appellant.

Mr. RALPH E. SPRIGG, for appellee.

REEVES, J. Appellant was arrested upon a charge of unlawfully assaulting, beating and striking one Effie Wegener, a small child under twelve years of age, thereby injuring said child in health and limb, and found guilty first before a justice of the peace, and afterward in the Circuit Court, where the case was taken by appeal, and sentenced to pay a fine of \$20. Appellant insists that the offense charged is the one which is defined in Section 81 of the Criminal Code which reads as follows: "Any person who shall wilfully and unnecessarily expose to the inclemency of the weather, or shall in any other manner, injure in health and limb, any child, apprentice or other person under his legal control shall be fined not exceeding \$500, or imprisoned in the penitentiary not exceeding five

years.” and that the justice of the peace had no jurisdiction to try such an offense.

We think this is clearly a misapprehension. The offense charged is an assault and battery. The alleged consequence of the battery, namely the injury to the child in health and limb, was not necessary to the statement of the offense of assault and battery. The statement of the offense was complete when it was charged that he unlawfully assaulted and beat the child.

Again it is urged that, as the complaint mentioned a specific day on which the offense was committed, the evidence should have been confined to that day. This contention can not be sustained. The complaint was that on the 27th day of May, 1889, and on divers other days and times before that date, the defendant did unlawfully assault, etc. Even if the words “and divers other days and times before that date” had been omitted from the complaint, we do not understand that the people would have been confined to the specific day mentioned in proving the offense charged. *Koop v. The People*, 47 Ill. 327.

It is contended that the evidence was insufficient to support a verdict of guilty. The child was the adopted child of appellant. He does not deny whipping her but insists that he only punished her when it was necessary. There can be no question of the right of appellant to use reasonable force in the correction of the child, and slight excesses in such correction ought not to subject him to criminal prosecution. But the testimony in this case, if believed by the jury, was sufficient to warrant the jury in finding that he had exceeded the bounds of reasonable correction of the child. It will not do to say that the father, or one standing in *loco parentis*, is to be the sole judge of the extent to which he may go, in the punishment of the child. If this were so, brutal treatment of a child would oftentimes go unpunished. The parent, or one occupying that relation, must be restrained by law to the use of reasonable corporal punishment of the child, and whipping and beating a child by the parent clearly in excess of reasonable correction, should make the parent amenable to the

law for such unreasonable and excessive whipping and beating. A regard for parental rights should not be carried to such an extent as to subvert and override the protection of the child against violent and inhuman treatment. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

JAMES E. HENEKIN

v.

THE INDIANA BRIDGE COMPANY.

Sales—Action for the Price—Estoppel—Evidence.

One who purchases bridges by the pound, and at the time of each purchase receives a statement of the weights, can not, after putting them up without complaint, claim overcharge in weights, and prove the weights by measurement.

[Opinion filed October 8, 1890.]

IN ERROR to the Circuit Court of Lawrence County; the Hon. WM. C. JONES, Judge, presiding.

Messrs. E. CALLAHAN and SETH B. ROWLAND, for plaintiff in error.

Messrs. FOSTER & MCGAUGHEY, for defendant in error.

REEVES, J. Plaintiff in error acted as agent for defendant in error under a written contract for the years 1887 and 1888 in the sale of its bridges in Illinois, and other territory. By the terms of the contract between the parties, Henekin was to take contracts for bridges in the name of the bridge company. He was to be furnished bridges at a price specified in the contract on board the cars at Muncie, Indiana, where the factory was located, and he was to receive the difference

Henekin v. Indiana Bridge Co.

between this price and the price at which he contracted to furnish and put up the bridges, as his compensation, he to pay freights and all the costs of putting the bridges in place.

The price so fixed was so much per pound for different kinds of bridges and different parts of the bridges. Under this contract the bridge company furnished Henekin a number of bridges, and this suit was brought by the company to recover a balance claimed to be due from Henekin. There is no dispute as to the number of bridges furnished. Henekin claims he was overcharged in weights; that the bridges did not weigh as much as he was charged in a number of cases. He seeks to maintain this part of his defense by making proof of the measurements of the bridges after they were put up, and a short time before this suit was tried, and from these measurements determine the weight of the bridges. It is not denied that Henekin was furnished an itemized statement of the amount of iron in each bridge at the time it was furnished. He had the opportunity then to test the accuracy of the weights charged and if he did not do so he can not expect that much consideration will be given to his objection of short weights, made for the first time nearly two years after most of the bridges were furnished. Again, we think that the testimony that an accurate measurement of the weight of a bridge can not be made after it is put up, is more satisfactory from the very nature of the case than that such a measurement can be made. Henekin claims that he weighed the Bridgeport bridge furnished August 31, 1887, and, of course, this must have been done before it was put up. He claims that the weight of this bridge fell short of the weight charged 2,700 pounds, and yet, so far as the testimony shows, the attention of the bridge company was not called to the shortage and no demand made for a rebate of the overcharge.

We think the trial court, trying the questions of fact without a jury, was justified in disallowing this defense. The account as presented by the bridge company at the trial showed charges and credits on account of commissions or pools. These were not allowed, as we infer from the amount of the judgment, and defendant in error concedes they should

not be considered in making up the account. We think the proof clearly shows a settlement between the parties on the 26th day of December, 1886. Taking from the balance found due by this settlement to the bridge company the pools that were included in it and there would remain the sum of \$487.80.

From Dec. 26, 1886, to close of account	
Henekin is charged.....	\$3,121 49
From this should be deducted amount of	
pools.....	200 00
Leaving a balance of.....	\$2,921 49
The amount of credits leaving items for	
pools out.....	2,268 90
Leaving balance due company on account	
1887 and 1888.....	\$ 652 59
Add to this the balance due on settlement	
Dec. 26, 1886.....	487 80
And we have a total due to time account	
was made up.....	\$1,140 39
Deduct cash paid after statement of ac-	
count.....	200 00

Showing a balance due bridge company \$ 940 39

The interest which defendant in error would be entitled to, added to this balance, would more than make the amount of the judgment of the Circuit Court, which was for \$1,000. Finding no sufficient reason for disturbing the judgment of the Circuit Court the same is affirmed.

Judgment affirmed.

Pergande v. The People.

HERMAN PERGANDE
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

Intoxicating Liquors—Illegal Sales—Evidence.

On indictment for selling intoxicating liquors to a person in the habit of becoming intoxicated, this court declines to interfere with a finding of guilty by the court below.

[Opinion filed October 8, 1890.]

APPEAL from the County Court of Massac County; the
Hon. J. C. WILLIS, Judge, presiding.

Mr. C. L. V. MULKEY, for appellant.

Mr. DOUGLAS W. HELM, State's Attorney, for appellees.

REEVES, J. Appellant was indicted for selling intoxicating liquors to Alfred Morris, a person who was in the habit of getting intoxicated. A trial was had before the County Court without a jury, and appellant was found guilty and sentenced to pay a fine. By this appeal appellant seeks to reverse the finding of the County Court.

The contention is that the evidence does not warrant such a finding. Alfred Morris testified that he bought whisky in appellant's saloon in the fall or summer of 1888, twice in one day; that he bought the whisky not from appellant nor his wife, nor from Charles Coulter or Asa Bumgardner, but from the man who was behind the bar at the time, whom he did not know and whom he did not describe further than to say he thought he was a middle-aged man. Proof was made by another witness that Alfred Morris was in the habit of getting intoxicated for a period of time extending back for eighteen months prior to the time the indictment was found, which was in April, 1889. Appellant testified that he knew

Alfred Morris and had never sold him anything to drink for years, and that Alfred Morris had not been in his saloon to his knowledge for years; from May 15, 1887, to June 15, 1888, his saloon was closed; from June 15, 1888, to March, 1889, he had no regular clerk in his saloon only his wife. It would have been impossible for Morris to have gotten the liquor in his saloon during that time unless he got it from him or his wife; that he had no clerk in his saloon with him until March, 1889, when he took sick; then Bumgardner was employed to tend bar for about a week; then Fritz Winters was employed for about two weeks; then Charles Coulter succeeded as bartender.

In answer to the question, who stayed at your saloon when you had occasion to go out in town, appellant answered, "Usually my wife." Both Bumgardner and Coulter testified that they did not sell any intoxicating liquor to Alfred Morris while they were in the saloon. Winters testified that he knew all the Morris brothers; that he could not describe any of them; that they all look alike; that he could not describe Alfred Morris, but he knew he did not get any liquor from him. This was all the evidence. It will be observed that appellant testified that he kept no regular clerk from June 15, 1888, to March, 1889, and that when he was out of the saloon during this time his wife usually stayed in the saloon. This is not such evidence as overcomes the positive testimony of Alfred Morris, that he did buy whisky twice in one day, in the fall or summer of 1888, in appellant's saloon. Even if we concede that appellant's testimony proves that he kept no clerk during the time mentioned, it does not show that no one stayed in the saloon during appellant's temporary absence, except his wife. While he does say, that during such temporary absence his wife usually stayed in the saloon, he does not say she always did, or that when she did not, the saloon was closed. The finding of the court, upon the evidence preserved in the bill of exceptions, is sustained. The judgment of the County Court is affirmed.

Judgment affirmed.

ISAAC NORTON

V.

THE CITY OF EAST ST. LOUIS.

36	171
45	508

Municipal Corporations—Indebtedness—Constitutional Limitation—Health Officer—Evidence.

1. The salary of a health officer appointed by a city is an indebtedness within the inhibition of Sec. 12, Art. 9 of the Constitution, prohibiting a city from becoming indebted beyond the constitutional limit.

2. A statement of a city's indebtedness, duly certified to by the city clerk, is competent original evidence of such indebtedness.

3. A record may be proven by a statement thereof sworn to as an examined copy.

4. In an action for salary due from a city for services, it is held: That the evidence shows that at the time the services were rendered, the city was indebted beyond the constitutional limit, and that it is not therefore liable.

[Opinion filed October 8, 1890.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. JOHN B. HAY, Judge, presiding.

MESSRS. KOERNER & HORNER, for plaintiff in error.

Mr. F. G. COCKRELL, for defendant in error.

REEVES, J. Plaintiff in error was employed by the city council of the city of East St. Louis to act as health officer of the city and performed the duties of the office from the 26th day of December, 1881, to March 20, 1884, at a salary of \$60 a month. He was paid for his services from December 26, 1881, to March 1, 1883, and he brought this suit to recover for the balance of the time he performed the duties of his office. The declaration contained the common counts and the plea was the general issue with a stipulation that, under the general issue, the defendant might introduce all legal evidence. The service of plaintiff in error for the

defendant was not disputed nor the price to be paid therefor, but the defense interposed was, that at the time the contract between plaintiff in error and the city was entered into and during all the time the services were rendered, to recover for which the suit was brought, the city was indebted beyond the constitutional limit. The cause was heard by the court without a jury and judgment rendered against the plaintiff for costs. The plaintiff asked the trial court to hold that the obligation incurred by the city of East St. Louis to pay the said Isaac Norton a salary as health officer, is not an indebtedness which is inhibited by Section 12, Article 9, Constitution of Illinois, which the court refused to do. This refusal is assigned as error. The proposition in the terms stated, in the light of the evidence in the case, was properly refused. The constitutional inhibition is not limited to bonded indebtedness of the municipality but applies to all indebtedness. It is true that a city may provide for its current expenses in a way that will not make the city liable in the sense in which the word indebtedness is used in this clause of the Constitution, for which there is explicit warrant in the statute. *Starr & Curtis*, 2460; *City of East St. Louis v. Flannigan*, 26 Ill. App. 449; *City of Springfield v. Edwards*, 84 Ill. 626.

It is insisted that the trial court erred in admitting certain evidence offered by the defendant to show that it was indebted beyond the constitutional limit when the liability to plaintiff in error accrued. James W. Kirk was introduced as a witness on the part of the defendant, and testified that he was auditor of the city from 1872 to 1876, and assistant city clerk in 1876 and 1877; that he was able to state what was the bonded indebtedness of the city in March, 1877; that at that time he compiled, for the city council, a paper showing in detail the indebtedness of the city, and which was published, by authority of the city council, in the *East St. Louis Gazette*, the official organ of the city. That he had examined a copy of the paper so prepared by him and published by the city recently, and verified it, and from such examination and verification he was able to say that it was a true and correct copy. That since May, 1887, to the time of

the trial, he had acted as auditor and comptroller of the city; that in 1888 the city issued new bonds and took up those outstanding, and, in so doing, he used and verified the compilation above referred to; that there was a bond register in 1877, but it was not now in the possession of the city, and had not been for several years. The defendant, having offered in evidence a certified copy of the assessed valuation of the property in the city as made out by the county clerk of St. Clair county, from 1876 to 1886, inclusive, the witness Kirk was asked this question: "Now, I will get you to examine this certified copy of the assessed valuation, as made out by the county clerk, and in connection therewith, you may state what the indebtedness of the city was in 1880." To this question an objection was interposed by plaintiff, and overruled by the court, and the witness was permitted to state the indebtedness of the city for 1880, and over a like objection to state the indebtedness of subsequent years. The official publication of the city's indebtedness in March, 1877, was also admitted in evidence over the objection of plaintiff.

In this action of the trial court it is insisted there is error. The statement of the debt of the city as it existed in March, 1877, was duly certified to by the city clerk, and was original evidence. *City of East St. Louis v. Freels*, 17 Ill. App. 339. Again, it was sworn to as an examined copy, and it is well settled that a record may be proven in that way. 1 Greenleaf, 508. The original bond register was not in the possession of the city, and had not been for several years. This official publication of the indebtedness of the city, made in 1877, showed that the debt then was \$273,294.49. It is also shown that very little was paid either of principal or interest on this indebtedness, and the debts of the city increased from year to year, until in 1888 it reached a sum over \$800,000. It is abundantly shown that from December 26, 1881, to March 20, 1884, while plaintiff in error was in the employ of the city, it was indebted largely in excess of five per centum upon the assessed valuation of its property. The city having shown that it was indebted in March, 1877, in the sum of \$273,294.49, and that this debt did not diminish, but constantly

increased, this, independent of the testimony as to the amount of the city's indebtedness for 1880 and subsequent years, by Kirk, was sufficient, taken in connection with the county clerk's certificate of the assessed valuation of the city, to show that from 1877 forward, the city was indebted beyond the constitutional limit. The fact that plaintiff in error has a just claim for his services, does not warrant us in overriding the defense interposed and, as we think, established.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1889.

WILLIAM MOONEY
v.
MICHAEL MORIARTY.

Homestead—Assignment—Practice—Execution—Evidence—Res Adjudicata.

1. Objections can not be raised for the first time in this court, which, if raised below, could have been obviated by proof or amendment.
2. An execution is not defective in not showing the date of the judgment.
3. The affidavit of the judgment debtor is not sufficient to contradict the sheriff's return that the commissioners summoned to set off the debtor's homestead were householders.
4. The amount of the homestead depends on the statute in force at the time it is set off.
5. A homestead which has been once set off, may, upon increase of the property in value, again be subject to assignment and division.
6. On motion by plaintiff in error to set aside an execution and sale of land which was claimed as his homestead and sold by him with warranty before the levy, it is held that he is bound by a decree in a suit to enjoin the sale, brought by his grantee and prosecuted in their joint interest.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Whiteside County; the
Hon. WM. BROWN, Judge, presiding.

Messrs. MANAHAN & WARD, for plaintiff in error.

Messrs. J. & J. DINSMOOR, for defendant in error.

C. B. SMITH, J. This writ of error is prosecuted from a judgment of the Circuit Court of Whiteside County in refusing to set aside an execution and sale of a part of Lot 1, in Block 44, in the city of Sterling.

In 1878, and prior thereto, the plaintiff in error, William Mooney, owned, and with his family resided on the whole of the above described Lot 1. About that time one R. L. Managen obtained a judgment and had execution issue against plaintiff in error, Mooney. Such proceedings were had under that judgment as resulted in the east 40 feet of Lot 1 being sold to satisfy Managen's execution, and the remaining 95 feet of the lot being set off to Mooney for his homestead under proceedings regularly had in the Circuit Court for that purpose. After Mooney's homestead had been so set aside and given him, he, with his family, continued to reside on the west 95 feet of the lot until the 12th day of April, 1883, when he sold it to Thomas A. Galt, and executed to Galt a warranty deed. Prior to this conveyance of this lot to Galt in 1878, Michael Moriarty, defendant in error, obtained a judgment against plaintiff in error for about \$400, and on the 23d of February, 1883, had an execution issued on said last named judgment. On the 15th day of April, 1883, three days after the sale to Galt, the sheriff levied his execution on the 95 feet sold to Galt, and advertised the same to be sold on the 11th day of May, 1883.

Thereupon Galt filed a bill against the sheriff and obtained a temporary injunction enjoining him from selling the property.

The grounds upon which the injunction was claimed in the bill were that the premises were the homestead of Mooney at the time of the sale to Galt, and that under the statute he had a right to sell it unaffected by the judgment. Issue was joined on this bill and upon a final hearing the injunction was made perpetual. An appeal from this decree was taken first to the Appellate Court of the First District and from thence to the

Supreme Court, where the decrees of the Circuit and Appellate Courts were reversed and the cause remanded. (112 Ill. 377.)

After the cause was remanded, and further hearing had, the injunction was dissolved and the bill dismissed. Galt's efforts then, to prevent this sale upon his bill, failed. Mooney himself swears that this bill was prosecuted in Galt's own name by agreement with and partly in the interest of him, the said Mooney, for the purpose of preventing the sale, and for protecting Mooney's warranty. After this injunction was dissolved the sheriff then proceeded to sell the land, and the claim of homestead then again being made, the sheriff proceeded under the statute to set off the homestead of Mooney, and summoned three householders, who, after being duly sworn, went on the premises and set off all of the 95 feet except the east 40 feet for the homestead of Mooney, or as such homestead, which he had a right to convey to Galt free from the lien of the judgment at the time it was conveyed.

The sheriff then sold the east 40 feet of the lot in satisfaction of his execution, and made return on his execution in what manner he had executed his writ and set off the homestead; the oath and report of the commissioners are returned with the execution.

At the next term of court Mooney, plaintiff in error, appeared in court and entered his motion to set aside the sheriff's sale. Upon hearing the court overruled the motion, and from that order this writ is prosecuted, and a reversal asked on two distinct grounds.

1. That the execution was a nullity because it had no date of any judgment. This cause was not set out in the written motion filed below, nor made one of the grounds for impeaching and vacating the sale below. It is raised here for the first time. This point comes too late. It is a well settled rule that parties will not be permitted to raise objections here for the first time, when, if they had been raised below, the objection could have been obviated by proof or amendment. *Dobbins v. The First Nat. Bank*, 112 Ill. 566. But this execution was not void. 2. If it was defective in wanting a date to

the judgment, it could have been amended by the judgment either before or after sale. *Durham v. Heaton*, 28 Ill. 264.

It is objected that one of the commissioners summoned by the sheriff to set off the homestead was not a householder as required by the statute. The only evidence to contradict the sheriff's return on that point was the affidavit of Mooney himself. We do not regard that evidence as sufficient alone to overcome the return of the officer acting under his official oath and obligations. The return of public officers made in the line of and discharge of their official duty ought not to be set aside, except upon very clear and satisfactory proof that they are not true. We have examined the numerous objections urged against the validity of this sale, and the regularity of the proceedings of the sheriff and commissioners in setting off the homestead, and are not able to find any such error as to affect either the fairness or the legality of the proceedings.

It is urged that the plaintiff in error had a right to a homestead of the value of \$1,500 at the date this allotment or assignment was made, and that a homestead of but \$1,000 was set off to him. We are not able to appreciate the force of this objection. The act of 1873 repealed the former act of 1872 giving a \$1,500 homestead and reduced it to \$1,000. The judgment was not taken against Mooney until in 1878 and the sale made in 1885. This claim of a \$1,500 exemption is placed on the ground that Mooney occupied this lot as a homestead in 1872, when the \$1,500 homestead exemption was in force, and that from that time and by virtue of that statute, he had a vested right of homestead which the subsequent act of 1873 could not take from him. There is no vested right growing out of a public law conferring favors or benefits upon the citizens when no element of contract or grant arises out of a statute. All such laws may be changed or repealed at any time according to the will of the State. *Dobbins v. First Nat. Bank*, 112 Ill. 566; *Cooley Const. Lim. Sec. 479*. The statute creating and giving the exemption or conferring rights at the time the exemption is claimed is the one that always governs the amount and the conditions upon which it is conferred. *Henson v. Moore*, 104 Ill. 403.

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It is also insisted that the homestead having been once set apart to plaintiff in error, that its status thereupon became fixed as a permanent homestead, not again to be a subject of re-assignment and division, and that the court erred in allowing it to be assigned and divided a second time.

Numerous cases from other States are cited in support of this contention. Whatever rights may be conferred upon the citizen of such other State under exemption statutes, it is clear to us that such a claim can have no foundation in reason or authority in this State. In growing States, cities, towns and communities, property which is to-day worth but \$1,000 may next year be worth \$5,000. In some of the larger cities of the State the growth in value of real estate has been such that a thousand dollars worth of property only a few days ago, is now worth many thousands. *Stubblefield v. Graves*, 50 Ill. 103; *Moriarity v. Galt et al.*, 112 Ill. 373.

Again, plaintiff in error admits in his affidavit that Galt prosecuted the chancery suit in their joint interest. Nothing that was involved in and adjudicated in that suit in relation to this sale and assignment of homestead, can now be again litigated in this motion by any one that was a party or privy to that suit. They are both bound by it. *Freeman on Judgments*, Secs. 162, 174 and 176; *Cole v. Favorite*, 69 Ill. 457.

Finding no error in the record the judgment is affirmed.

Judgment affirmed.

CHARLES H. WHEELER

v.

JOHN J. McDERMID ET AL.

Gaming—Contract to Buy and Sell Grain on Future Delivery—Brokers—Evidence—Instructions.

1. In assumpsit for commissions and money advanced by plaintiff on defendant's account in transactions on the Chicago Board of Trade in buying and selling grain, this court holds that the transactions were illegal.

36 179
99 619

36 179
104 4 96

2. A contract to buy and sell grain on future delivery with the intention, not of actual delivery, but of making a settlement by paying the difference between the agreed and the market price, is a gambling contract.

3. The burden of proving the legality of such a contract is on him who seeks to enforce it.

4. Where an indivisible demand is in part illegal, no recovery can be had for any part of it.

5. An agent or broker who knowingly executes an illegal transaction for his principal can not recover money advanced in furtherance of it.

6. Where there is no evidence on which to base it, an instruction should be refused.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Ogle County; the Hon. WM. BROWN, Judge, presiding.

MESSRS. HATHAWAY & BAXTER, for appellant.

MESSRS. E. H. & N. E. GARY, for appellees.

C. B. SMITH, J. This was an action in assumpsit on the common counts brought by appellee against appellant to recover a balance claimed to be due on account of commissions and money due appellee for advances paid to the use of appellant growing out of certain transactions in grain on the Board of Trade in Chicago. Appellant pleaded, first, the general issue; second, the statute of limitations, and third, that the consideration of appellee's claims was the product of gambling transactions on the Board of Trade. A trial before the court and a jury resulted in a verdict for appellees for \$2,119.90, upon which the court gave judgment after overruling a motion for a new trial. The appellant now prosecutes this appeal, brings the record here, asks for a reversal and assigns the usual errors.

The errors chiefly relied upon here, are that the verdict is against the evidence and that the court erred in instructing the jury.

The material facts connected with and surrounding the transactions involved in this suit are about these: Appellee is a member of the Board of Trade in the city of Chicago,

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and buys and sells for his customers on commission, as a part of his transactions on the board. Appellant was and is a minister of the gospel living in Ogle county, Illinois.

Appellant was introduced to appellee by a mutual friend on the 3d of August, 1882. After appellee had invited appellant and his friend to visit the Board of Trade and shown them around he informed them that "If at any time he could do anything for them he would be pleased to do it." Appellant then expressed a doubt as to the propriety of a minister dealing on the Board of Trade, but appellee said it was just as legitimate as to buy a horse.

Appellant went again on September 6th to appellee's office and told him he thought he would "speculate" a little in future months of grain. It was then agreed he should deal in corn at the suggestion of appellee.

Appellee's detailed statement of his account attached to this declaration is the shortest way to tell what followed with its consequences to appellant.

COPY OF ACCOUNT SUED ON.

C. H. WHEELER, Creston, Illinois.

In account with McDERMID, RUSS & Co., for use of J. J. McDermid.

Please examine at once and report if correct. Chicago, Ill.

1882.	1882.
Nov. 10. To loss on sales..\$1,012.50	Sept. 6. By cash.....\$ 400.00
13. " " " " .. 1,587.50	13. " " 450.00
18. " " " " .. 2,543.75	Oct. 14. " profits on sales 750.00
Dec. 15. " " " " .. 2,937.50	19. " " " 25.00
	12. " " " 112.50
	24. " cash..... 1,000.00
	30. " " 1,997.50
	Nov. 9. " profit on sales. 668.75
	14. " " " 1,118.75
	Dec. 15. " balance..... 1,558.75
	\$8,081.25
Dec. 15. To balance.....	\$1,558.75
Interest to April 1, 1888.....	495.00
Due April 1, 1888.....	\$2,053.75

An analysis of this account shows that from September 6th to December 15th, appellee had won as profits on his deals

\$2,675, and that he lost within the same time of his "speculations" \$8,081.75, leaving a balance against him of \$5,326.25.

The account further shows that during this time he paid to appellees the sum of \$3,947.50 in cash to keep good his margins. At the conclusion and final statement of the account appellant finds that his \$3,947.50 is all gone with a debt of \$1,558.75 still standing against him. This account shows a net loss of \$5,506.25 to appellant as a result of his speculation in a little over two months. Appellant now contends that this whole transaction was a gambling scheme and void under the statute. Appellee on the contrary insists that it was a real and *bona fide* transaction and was an actual buying and selling corn for future delivery to the buyer. Was it so? We think it was very clearly not so, in fact, nor intended to be so. Appellant swears that he told McDermid (appellee) when he first entered upon this arrangement to "speculate" on the board, that he did not want any grain delivered to him, and although appellee denies this statement we think all the facts and circumstances in proof support appellant. Appellee knew appellant was a clergyman, and that he was not a dealer in grain and did not reside in Chicago, and that he, in fact, had no grain to sell and that he had no facilities for receiving grain in Chicago, and that he was without any experience or knowledge in the perilous enterprise he was then about entering. Appellant then expressed doubts about the propriety of the business for a minister of the gospel, but he is assured by McDermid that it is a legitimate business. If appellant was going to buy 400,000 bushels of corn of McDermid in good faith, to be delivered in May or January, and if they both understood the corn was then to be delivered to appellant, and that McDermid was then to be paid the market price for the corn, then all the world would know that was a strictly legal transaction and there would have been no necessity for any discussion between the parties as to the morality, propriety or legality of such a transaction.

The very fact that the conscience of this honest clergyman pricked him as he stood in the charmed circle of the "corn pit" and watched the conflict between the "bulls and bears,"

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and looked with longing eyes upon the golden calf he was about to worship, is a circumstance not without signification as showing what the intention of appellant was. The proof shows that between September 6th and December 15th of the same year, appellee bought and sold for appellant as his agent or broker, as stated by appellee himself, "hundreds of thousands of bushels of corn." On a single day appellant sold 400,000 in two sales of 200,000 each. One single purchase was for 400,000 bushels; and yet not a bushel of corn was ever seen, received or delivered, demanded or refused, or tendered by anybody named in this record, nor any warehouse receipts shown or produced, or offered to be produced. True, appellee and his clerk swear that a large amount of this corn was delivered, but to whom or how it was delivered they do not say. There is no pretense that appellant himself received any of his princely purchases, nor that he delivered any of his sellings, nor that he authorized appellee to either deliver or receive corn for him. The only proof of any actual delivery of anything on the part of appellant was of his honest cash. Nichols testifies to knowing that 75,000 bushels of corn were delivered because he saw it on the books, but he did not make the entry or deliver the corn. McDermid swears that he had a book there showing the names of all persons of whom he bought and sold corn, and that the grain was delivered on the Board of Trade in every case, but the book was not produced, nor any man who delivered an ear of the corn, nor the transfer of any warehouse receipt. McDermid does not pretend to have actual personal knowledge of the delivery, but says the book shows it. McDermid swears that only in something over one-tenth of the deals on the Board of Trade was there any actual delivery of grain.

We think the delivery mentioned by appellee, in the light of all the evidence, and in the total absence of all facts which would indicate any actual delivery of real corn, or anything to represent actual corn, must be regarded as highly apocryphal and that there was, in fact, no more delivery of corn than there was of buying and selling corn, in fact. Book

entries seem to have been the only evidence of either buying, selling or delivery. It is perfectly certain that appellant never did have any corn for appellee to deliver to anybody, for nobody pretends to have delivered him any, nor to appellee for him. His deals were all closed out long before he was entitled to receive corn under his purchases, and before he was bound to deliver any under his sales. Where, then, did appellee get this 75,000 bushels of corn he pretends to have delivered for appellant? Was this country parson a merchant prince that he could "corner" the corn of Illinois, or a Joseph that he could buy and crib such vast quantities of corn without money and without credit? To believe that such a thing was possible is to tax credulity to the utmost limit, and to substitute for reason and common sense, mere fairy tales, and gullibility that would put Baron Munchausen himself to shame.

It is most unreasonable and extremely improbable to suppose that appellee for one moment supposed or thought that appellant could receive or deliver any of these immense purchases and sales, or that he could either pay for them if offered to him, or go into the market and buy the corn for delivery if it had been demanded of him. To justify an honest belief on the part of appellee that appellant intended to receive and deliver the immense volume of corn he was buying and selling for him, there must have been some facts in existence upon which to predicate such marvelous faith. There is a reasonable intent behind every intelligent human action, and when it becomes important to determine what the motive or intent was, it is much safer to have resort to the conduct and action of the parties to determine it, than to look to mere declarations of a party as to what the intent was.

We think by applying this test to determine the real nature of the transaction involved, and to get at the real intention of the parties, that the delivery mentioned by appellee was nothing more or less than swapping trades or balancing one mythical transaction against another of the same kind, and so finding a balance against one party or the other, and make him against whom the balance is found make it good.

This is, indeed, the explanation given by appellee himself

as to the mode of settling Board of Trade deals when actual delivery does not occur.

Can there be any fair claim, or pretense based on reason and the observation of men, that any such transaction is real or *bona fide*? We think not. Again, we do not understand from the evidence in this record, or from the argument of counsel for appellee, that a single dollar of the \$3,497.50 actually paid to appellee by appellant, or of the \$2,675 of the profits made by appellee, ever was used to pay for any corn; in fact. What then became of this \$6,022.50? What did appellant do with it? He paid it out to keep up the equilibriums between these fluctuating, mythical transactions, which were to be balanced in May or January, or at such other times as was agreed upon, in order to keep the transaction alive until the date agreed upon for its termination or adjustment, in order that appellant might then show in the balancing transaction with the possible chance of finding the difference in his favor.

In other words, this money was all consumed in the payment of margins instead of corn. As showing the real character of these transactions as appellee understood them, we will quote from the testimony of appellee McDermid himself:

"We didn't deliver the corn to Mr. Wheeler. He didn't want us to. He couldn't deliver. They wouldn't allow him to. We made the contracts with other members of the board. We were representing Mr. Wheeler. He gave us a margin of \$400, then \$450, and \$1,000, and \$1,997.50. That is the actual amount he sent us. We never paid him a dollar. We were doing a commission business and nothing else. All transactions on the Board of Trade are carried out in good faith. They have to be, unless a man fails. Such a thing as settling differences on the Board of Trade between the parties by cash payments is unknown; money is paid when article is bought at one price and sold at another. Money is paid to settle differences. The proportion of deliveries is very large indeed. I should say that a good deal more than one-tenth of the transactions there are actual deliveries." In a few

minutes afterward he swears "that grain was delivered to members of the Board of Trade in every case."

In another part of McDermid's testimony he swears, in speaking of the delivery of this corn, "I have stated that I found where 75,000 bushels were delivered directly. I know 75,000 bushels were delivered; the balance was closed by offsets."

Upon appellee's own testimony there were 25,000 bushels of this corn disposed of by settling differences between the market and the purchase price by simply offsetting one deal against another, which is in violation of the statute. His claim is to recover for the losses sustained in this entire transaction. Where a part of entire consideration of a contract is illegal, or where an indivisible demand not susceptible of division is in part illegal, the illegal part taints the whole so that no recovery can be had for any part of the demand. *Tarry v. Foot*, 95 Ill. 99.

Just what appellee means in all his statements is not quite clear, but that he has quite a free and off-hand way of testifying is quite apparent. It is hardly probable that he is sufficiently well acquainted with all the Board of Trade transactions to justify him in saying of his own knowledge they are all carried out in good faith. In one sentence he says "settling differences on the Board of Trade between the parties by cash payments are unknown," and in the next sentence he says: "Money is paid when article is bought at one price and sold at another; money is paid to settle differences."

Again speaking of deliveries he says: "*I should say in a good deal more than one-tenth of the transactions there are actual deliveries.*"

If this statement is correct, it tends strongly to support appellant's theory that at least some of the transactions on the Board of Trade are colorable only, and have little or no real connection with corn or wheat. On the trial a number of letters were read, showing the correspondence between the parties. To further show what appellee understood the nature of these transactions to be, we quote from three of his letters to appellant.

In his letter of December 26, 1883, to Wheeler, McDermid, among other things, says: * * * "We never seek to influence any man's judgment, provided he has money to protect his trades. You insisted on trading in such large amounts that we were obliged to urge closing some of it, to prevent our making a loss, and the sequel shows that if a loss had been made on the other side, we could not have gotten our money without difficulty."

Again, on February 19, 1883, McDermid writes Wheeler * * * "On that (Professor McMillan's) recommendation, we trusted you or rather I trusted you, because your trades would have been closed when the margin expired, had it not been for me."

Again, in September 7, 1882, appellee writes to Wheeler: * * * "We regard it cheap for a long deal, but if you wish to take a little money and wait for another decline, please advise us at what figure we shall sell it out; you know, of course, you can sell at any time and draw your profits and margins as soon as sold."

The expressions used in these letters by appellee are not apt for describing a real *bona fide* sale or purchase of corn to be delivered at any day in May, at the option of the seller and to be controlled by the seller, but exactly the reverse. If the seller fails to keep his margins up to the market, then he loses all control of the supposed corn he is to deliver, and his own broker takes charge of the deal and sells him out without consulting his principal.

A good deal of stress both in testimony and in argument of counsel is placed upon the fact that appellee was exclusively a commission merchant, and that he executed appellant's orders exactly as given. There is no merit in this claim. An agent or broker who knowingly engineers and executes an illegal transaction, and advances money to secure its accomplishment can no more recover his money than one of the principals. *Irwin v. Williams*, 110 U. S. Rep. 225.

Although appellee in this case seeks only to recover for the loss on the last sale of 100,000 bushels of corn, and seeks to limit his testimony only to that part of the dealings between

the parties, still his account filed, and the proof before us, disclose the nature of the entire transaction, and show them all to have been gambling contracts.

We think the verdict is very clearly against the weight of the evidence and that it was error in the court not to set it aside.

Appellant also insists the court erred in giving appellee's 4th instruction, which reads as follows:

"The court instructs the jury that even though it was arranged or understood between the plaintiffs and the defendant that the sales and purchases to be made on account of or for the benefit of the latter, should be so made that there should be, before the time of delivery should arrive, as much of any certain commodity sold as there should be purchased so that as between the plaintiffs and the defendant, the sales might be offset against the purchases, yet, if it was also further arranged or understood at the same time that all the contracts for sale or purchase to be made, should be lawful and for actual delivery, then the whole contract or arrangement as above stated, was not unlawful." (*Given.*)

The first objection to this instruction is, that its different clauses are inconsistent and repugnant to each other. If the hypothesis supposed in the first part of the instruction was established by the proof, then the second member of the proposition could not exist and could not be performed, or certainly would not be, for no occasion could arise after the contracts were balanced before the day of delivery and thus canceled, for an actual delivery on the day set for such delivery. But the first clause of this instruction is directly within the prohibition of the statute, and informs the jury that the parties may do what the statute declares they shall not do, and this palpable misdirection was not cured by the second clause, adding that still, if they agreed at the same time the transaction should be lawful and the grain should be for actual delivery, the whole arrangement would not be unlawful.

The instruction all taken together means simply that if parties contract to do an unlawful thing and afterward execute such unlawful contract, still if they further agree that such

contract should be lawful and they reserved the right to do some act to make it lawful, but never performed the act necessary to make it legal, the whole transaction would be legal. It will hardly be seriously contended that a transaction prohibited by law can be made legal and valid by simply calling it so.

The first clause of this instruction falls within the definition of a gambling contract laid down by the Supreme Court of the United States in *Irwin v. Williams*, 110 U. S. Rep. 225. The court say: "When brokers in form make contracts for future delivery in their own names with other brokers claiming to base said contracts upon orders received by them from persons whose names they do not disclose, and when, from all the facts and circumstances surrounding the transactions it appears that no actual delivery was intended, but merely the settlement and payment of differences, such brokers can not receive from those undisclosed principles money paid out by them in their own names." In *Barnard v. Backuss*, 52 Wis. 593—"When contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to receive the difference between the price agreed upon and the market price, at some future day, they come within the statute of gaming and are void in law."

"To uphold such a contract it must affirmatively and satisfactorily appear that it was made with an actual view to deliver and receive the grain and not as an evasion of the statute or as a cover for gambling transactions."

And in *Carrol v. Holmes*, 24 Ill. App. 453, the court say: "No matter what the forms of the several transactions were on their face, if the facts and circumstances show that such forms were colorable, and that it was the real intent of both parties that there were to be no actual sales, no delivery or acceptance of the subject-matter of the contracts, but that the damages were to be adjusted upon differences, then they were gambling transactions and within the purview of the statute." *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33.

The foregoing cases and many others which might be cited hold that all such contracts as are to be settled by merely ascer-

taining differences between the agreed price and the market price, and when it does not affirmatively and satisfactorily appear that there was an actual intention on the part of the buyer to actually receive, and on the part of the seller to actually deliver or make a *bona fide* offer to deliver, the grain itself, or a warehouse, or other valid receipt or voucher calling for and representing actual grain, then, as to all such contracts they are held to be merely colorable and are within the statute against gambling, and in all such cases the burden of proving the legality and good faith of such transactions is upon him who asserts its legality and seeks to enforce it.

We must not be understood as holding, that, when either one of the parties is acting in good faith, and entering into his contract with a present intention to carry it out, and does so carry it out, or offer in good faith to do so, with an ability to make his offer and contract good, that he may not enforce his rights against the other, although the other may not be acting in good faith.

The fourth instruction was directly contrary to all the decisions we have above cited, and contrary to the principles we have announced; it was against the plain language of the statute, was erroneous, and should not have been given. Its effect was to eliminate the entire defense from the case. The fifth instruction given for appellees is open to the same objections as the fourth and should not have been given.

Refused instruction number three, offered by appellant, was properly refused. While it contains a correct principle of law there were no facts in the case calling for its application.

Complaint is made by appellant that counsel for appellees in the closing argument made use of language which was not justified by the evidence, and which was well calculated to prejudice the jury against him. The language complained of was to the effect that "appellant Wheeler's counsel knew that the plaintiff was able to show that this was not the first transaction of the kind in which the defendant Wheeler has laid down under his obligations to those who were carrying out his orders in deals like the one in question." While we should not reverse this case upon that ground we must

Ewing v. Bailey.

express our disapprobation of the use of the language. It was well calculated to influence the jury against appellant and on account of his calling excite a feeling of hostility to him. Matters not in proof, which tend to degrade litigants or to in any wise impeach their character or honesty beyond what the evidence shows or tends fairly to show, should be rigidly excluded from the jury, and any attempt of counsel to drag before the jury, directly or indirectly, matters not in evidence or fairly inferable from the evidence, is an abuse of the principle of counsel and ought to be instantly rebuked by the court. This practice is much more mischievous in a closing argument where no reply can be made.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

ROBERT S. EWING
v.
ALEXANDER C. BAILEY.

Master and Servant—Wages—Recovery of—Evidence—Witness—Religious Belief.

1. In an action for wages under a contract of hiring, this court declines to interfere with the finding for the defendant.

2. In an action on a verbal contract, a memorandum made by one of the parties and read to the other, at the time the contract was made, is admissible as tending to show what the contract was, and also as part of the *res gestæ*.

3. A person's religious belief or unbelief can not render him incompetent as a witness.

[Opinion filed May 28, 1890.]

APPEAL from the County Court of Stark County; the Hon. MILES A. FULLER, Judge, presiding.

Mr. FRANK A. KEENS, for appellant.

Mr. W. W. WRIGHT, for appellee.

LACEY, J. This suit was commenced by appellant against appellee before a justice of the peace and there tried, resulting in a judgment in favor of appellant for \$36, from which appellee appealed to the County Court, in which a jury was waived, and a trial by the judge resulted in a finding for appellee and judgment against appellant for costs, from which an appeal is taken to this court.

The suit was based on an alleged agreement between the parties by which appellant was to do work on a farm for appellee from October 15, 1888, to March 1, 1889, at \$20 per month. The appellant agreed to take his pay in a horse valued at \$75, less a saddle valued at \$20, which horse the appellee then sold to appellant, and at the same time appellant sold the saddle to appellee. The balance of the pay for the labor was to be in money. The appellee denied the contract as alleged as to the length of time appellant was to work, insisting he was only to work long enough to pay the difference between the horse and saddle, or \$55.

The only dispute was as to the length of time the appellant was to work. After the appellant had worked three and one-fourth months, the latter discharged him and paid him in full up to that time. This suit is brought to recover for the balance of the time not fulfilled up to the first of March, 1889, after giving credit for \$9, which the appellant had earned elsewhere in the meantime, leaving a balance claimed of \$36 for unworked time. We have examined the evidence carefully as well as read the arguments of the counsel on either side and find that the evidence is very conflicting, the appellee swearing that the time was not fixed, only the appellant was to work for \$20 per month, in which he was corroborated by a memorandum in writing kept in appellee's book, which, as he swears, was made at the time and read over to appellant and which did not fix the time the contract was to continue. On the other hand appellant denied that the contract was read over to him in the form found in the book, but as read, specified the time as he contends.

He also testified to the contract as alleged, and in this he was corroborated by the evidence of the two witnesses whom

he introduced, who testified to admissions of the appellee to the effect that the contract ran to March 1, 1889. These admissions were denied by appellee either fully or partially. The court found on the evidence in favor of appellee, and we are not prepared to say that the weight of the evidence is so manifestly against the finding that we ought to reverse for error in that particular. It was a fair question for the court and we think its finding ought to be conclusive as to the question of fact.

It is objected on the part of the appellant that the memorandum was improperly admitted in evidence. We think not. It was evidence tending to prove what transpired, or so alleged by appellee, at the time the contract was made, and was a memorandum, though not signed, which appellee claimed contained the basis of the contract and was assented to by appellant. While such memorandum may not have all the binding effect of a contract, yet it is entitled to very great weight, and is certainly admissible in evidence.

It was also a part of the *res gestæ*. *Purington v. Akhurst*, 74 Ill. 490.

It is further objected that the appellee was disqualified from being a witness on account of religious belief, or the want of it. It appeared from his examination on his *voir dire* that while, as far as he had any fixed belief, he believed in an Overruling Power, and believed if there was such a Being, he would be punished for swearing falsely, either in this world or the next, he further stated that he hardly believed that there was a state of punishment hereafter. We are inclined to think that the witness would be qualified under the rule laid down in the *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541, which holds the rule of law to be, "that all are competent who believe in a God, the Creator and Preserver of all things, and that He will punish them if they swear falsely, in this world, or in the next; and a want of such belief will render them incompetent to take an oath, without which no one can testify in a court of justice."

The appellee believed that an Overruling Power, which is God by another name, would punish in this world for swear-

ing falsely. Again, the statutes of this State provide for punishing the crime of perjury, and this is another restraining element against the commission of such a crime. But whether or not the appellee would be competent, under the strict rules of the common law, we hold that under the provisions of Sec. 3, Art. 2, of the Constitution of 1870, that he would be a competent witness irrespective of his religious, or want of religious belief; and the above case, cited from the 17th Ill. Reports, it will be seen, was decided prior to the passage of the Constitution of 1870, but under the Constitution of 1848, which contained no such provision as is found in said Section 3. Sec. 3, Art. 2, of the Constitution, provides that "No person shall be denied any civil or political rights, privilege or capacity on account of his religious opinions," etc. It will be seen by the above that it is very comprehensive. It not only saves all the civil and political rights of the citizen as against any religious opinion, but "privilege and capacity." Now, it can not be denied that the right to testify is a privilege, especially when the party is called to testify in his own behalf, and which he would be allowed to do save for religious opinions. It is also a capacity in which generally the citizen may act, and according to the Constitution he can not lose by reason of his religious opinions.

The above section is a substantial copy of the Constitution of the State of Virginia, which provides that "All men shall be free to profess, and, by argument, maintain their opinions in matters of religion; and the same shall in no wise affect, diminish or enlarge their civil capacities." Under this Constitution, the Supreme Court of the State of Virginia held that no witness could be excluded from testifying on account of his religious belief or unbelief. *Peary v. The Commonwealth*, 3 Grat. 632. So, we think, since the adoption of the Constitution of 1870, the rule of law disqualifying witnesses on account of religious opinions has been entirely changed. The penalties denounced by law against the crime of perjury, and the innate moral principles of man, and the inborn sense of right and wrong, are now regarded such a sufficient guarantee against false swearing as to admit witnesses to testify, leaving

it to courts and juries to determine the weight proper to be given to their evidence. Under the common law as held formerly by our Supreme Court, no man could be called in a court of justice to testify unless he believed in a God, who would punish for such crimes, either here or hereafter. Fear of Divine punishment seemed to be thought the only effective restraint against the crime of perjury, and yet the same law prescribed that no witness should be qualified to testify in a case where he was a party, or had the slightest pecuniary interest in the result of the suit. The policy of such rules has long been doubted by many wise jurists and legislators. The last mentioned rule has been changed by our Legislature for some years, with happy results, and almost universal approval, following the change of the former rule, as we understand it, by the Constitution of 1870. It was aimed, as we think, by the constitutional convention, to firmly establish all men in this State, without regard to their religious beliefs, in the full enjoyment of their civil rights, privileges and capacities, including the right to testify, beyond the power even of the Legislature to change.

We therefore hold that the court below committed no error in allowing appellee to testify regardless of his religious belief.

The judgment of the court below is affirmed.

Judgment affirmed.

36	196
45	137

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY

v.

ANTON MERCKES.

Railroads—Personal Injuries—Defective Appliances—Contributory Negligence—Instructions—Evidence—Fellow-Servant.

1. The master is not liable for an injury sustained by his servant, where the negligence of the servant or his fellow-servants caused the injury, or materially contributed to it.

2. Where a servant enters into a hazardous employment with knowledge of the hazard, and of the master's negligence in providing safe appliances, and continues therein without objection and without the master's promise to remove the hazard, he can not recover for injuries resulting therefrom.

3. An instruction should be refused where there is no evidence to which it can apply.

4. An instruction that it is the master's duty "to furnish reasonably safe machinery," imposes a higher degree of care than the law requires.

5. An erroneous instruction given for the appellee, is not reversible error, where an instruction to the same effect was given for the appellant.

6. An instruction which ignores material facts which were proven, is erroneous.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the
HON. ISAAC G. WILSON, Judge, presiding.

Messrs A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER,
for appellant.

In the case of Camp Point Mfg. Co. v. Ballou, Adm'r, 71 Ill. 418, the Supreme Court, in discussing this identical question, says on page 419: "The doctrine upon this subject appears to be, that an employe can not recover for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, after he had knowledge of the defect, and continued his work, it being held that upon becoming aware of the defective condition of such machinery he should desist from his employment; but if he does not do so, and chooses to continue on, he is deemed to have assumed the risks of such defects; at least when he had not been induced by his employer to believe that a change would be made and had not plainly objected." And cases there cited.

"There was also evidence tending to show that appellee had been familiar with the defective condition of the brakes for some time, that he had made no complaint to the officers of appellant on that account, and freely continued to work and ride on the train with full knowledge of whatever peril was thereby occasioned. If this was true, then he can not recover

for any injury he may have received on account of such defective condition of the brakes, for the rule, as stated by eminent text writers, is: 'When an employe, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he can not complain if he is subsequently injured by such exposure.'” The St. Louis & S. E. Ry. Co. v. Britz, 72 Ill. 256.

The case of the Chicago & Alton Railroad Co. v. Charles Munroe, in the 85th Illinois, page 25, is in point. Mr. Justice Scholfield delivered the opinion of the court, in which he said: “This was an action on the case by appellee against appellant for injuries received by appellee while in appellant’s employ as a switchman, in coupling cars. The injury was to the hand, and was occasioned, as appellee says, by reason of the absence of a thimble or iron link in the bumper to the switch engine, to keep the coupling link from running back. There is controversy in the evidence whether the absence of this thimble or link increased the danger of coupling; but assuming that it did, the evidence is that appellee knew of this danger long prior to the time he received his injury, and voluntarily continued to couple cars. He says: ‘It was mostly that way all the time. I knew it was not very safe and that there was something the matter with it. I knew all the time, for several years, that the pin went back too far, and made objection to it to Mechlin, but don’t know how long before that; Mechlin said he guessed it was as safe as any of them, and I went right on working with it when it was out.’”

The case of Simmons v. Chicago & Tomah Ry. Co., 110 Ill. 340, is, in our opinion, decisive of this question. The opinion was delivered by Mr. Justice Sheldon. Without stating the facts in that case we desire to call your Honor’s attention to the principle which covers this class of cases as announced by the Chief Justice in the following language, to be found on page 347:

“In Pennsylvania Co. v. Lynch, 90 Ill. 333, this court said that while there is an implied contract between employer and employe that the former shall provide suitable means, appliances and instrumentalities with which to perform the

labors required of the latter, and also that the latter shall be advised by the former of all the dangers incident to the service to which the latter is not cognizant, 'yet the failure of the employer in this regard furnishes no excuse for the conduct of an employe who voluntarily incurs a known danger. He must himself use due care and caution to avoid injury. If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he does thus enter it, he assumes the risk and must bear the consequences.'

"And in *St. Louis & Southeastern Ry. v. Britz*, 72 Ill. 261, there was approval of the rule laid down in *Wharton on Negligence*, Sec. 214, 'that when an employe, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he can not complain if he is subsequently injured by such exposure.'

"To the same effect are *Clark v. Chicago, Burlington & Quincy Railroad Company*, 92 Ill. 43, and *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417. If a servant, knowing the hazards of his employment, as the business is conducted, is injured while engaged therein, he can not maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury. Many cases affirming this principle are cited in the brief of counsel for defendant. It was expressly laid down in *Naylor v. Chicago & North-Western Ry. Co.*, 53 Wis. 166—a parallel case with this in its facts, of an injury from the fall of a bank of earth under which plaintiff was excavating. In *Morey v. Lower Vein Coal Co.*, 55 Iowa, 671 (a case of injury to a miner by the falling of the roof of the mine), it was laid down: 'The true rule is that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof of the mine, and he continued to work in a dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk and can not recover.'

"In *Hughes v. Winona and St. Peter R. R. Co.*, 27 Minn.

C., B. & Q. R. R. Co. v. Merckes.

137, the Supreme Court of Minnesota sanctioned the rule that 'if a man engages in a service with a full knowledge of the manner in which his employer conducts his business, and without objection, he is deemed in law to have assumed and taken upon himself all the risks naturally incident to conducting business in that way, even although it be unsafe.'"

There is still another case which we desire to call your Honor's attention to, and that is the case of *Stafford v. The Chicago, Burlington & Quincy Railroad Company*, 114 Ill. 244. On page 247 of that volume the Supreme Court say: "We are firmly committed to the principles:

"Third.—If a person, knowing the hazards of his employment, as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master." (See authorities then cited by the court.) See also *C. & E. I. Ry. Co. v. Geary*, 110 Ill. 383, and *C. & N. W. R. R. Co. v. Donahue*, 75 Ill. 106.

Messrs. CHARLES WHEATON and SAMUEL ALSCHULER, for appellee.

C. B. SMITH, J. This was an action on the case brought by appellee against appellant to recover for injuries received by him while in its employ. Appellee recovered a verdict for \$5,000, and the court, after overruling a motion for a new trial, gave appellee a judgment on the verdict. Appellant brings the case here on appeal, and assigns for error, 1st, that the verdict is against the law and the evidence, 2d, that the court erred in admitting evidence, and 3d, that the court erred in giving instructions for appellee, and in refusing instructions for appellant. The material facts out of which this suit arises, are briefly as follows: Appellant has large machine shops, and a roundhouse adjacent to each other, and connected by folding doors, in the city of Aurora. The shops and roundhouse in question were and are used for the

purpose of building and repairing locomotive engines. The roundhouse was constructed after the usual manner, with a turn-table in the center, with a large number of tracks leading from the center to the outer side of the building, like the spokes to a wheel. There was an inside circular wall in the roundhouse, parallel to the outside one, leaving a space of about forty feet between the two walls. So much of the tracks as lay between these two walls had the space between them excavated for a depth of about twenty inches for the convenience of the men working under the engines. There was thus left a pit between each of the tracks between the two walls. These pits were so constructed that the stone wall on which the iron rails rested projected toward the center of the pit about four inches beyond the inside of each rail for the purpose of forming a rest and support upon which to lay boards used in bridging the pits.

For the purpose of bridging the pits, the company provided pine boards about a foot wide and about three inches thick, and long enough to fit in cross-wise between the rails. The heavy material used in building and repairing engines was hauled across these tracks to whatever point it was needed by the men upon carts provided and used for that purpose, and over the bridges so made by these loose boards, cut and made for that purpose. The boards were loose and movable to any point where or whenever it became necessary to bridge the pits between the tracks. This method of using and bridging the tracks and transporting material over them had been in constant use for a great many years, and appellee was perfectly familiar with it. At the time of his injury appellee was working with a gang of men whose particular business it was and had been to haul heavy material from the machine shop into the roundhouse with the cart or buggy over these tracks and temporary bridges, to whatever point the material was needed.

On the day appellee was hurt, he, in company with his foreman and five or six other of his co-servants, was directed to haul a heavy iron frame weighing about four thousand pounds, and about twenty feet long, from the machine shop

into the roundhouse, to a point where a locomotive was being built. The frame was loaded on the cart by means of a "crane." The frame was longer than the cart. Appellee and one of his companions and co-servants took the front end of the cart to guide it in the right direction; the foreman and the remainder of the men took their places at the rear end of the cart to push. After passing through the doors into the roundhouse the cart was turned to the left, and it became necessary to cross three of the tracks and bridges to get to the fourth track, where the frame was needed. In crossing the third track the right wheel of the cart ran off the boards forming the bridge, and dropped down into the pit, causing the heavy iron frame to fall off the cart, and in falling it caught appellee's foot, so injuring it that amputation became necessary.

The complaint in the declaration is that appellant did not furnish good hardwood boards and have them bolted together so as to make a safe bridge, and that it allowed the boards used to become old and rotten, and too short, and worn out, etc., so that the work could not be safely done. The plea was the general issue.

There was no proof that the boards were rotten, or too short, nor that they were not strong enough to bear up the cart with its load. The board on which the cart was running did not break. It is certain from the proof that the wheel of the cart was allowed by the men in charge of it, either to run off the boards entirely on the south side, or to run into a crack between the boards, and drop down. The plaintiff himself swears that the bridge on which they were crossing was wide enough. All the witnesses agree that the individual boards were a foot wide and about three inches thick and about four feet long, and that the ends rested on a rock foundation between the iron rails. There is no claim that the company had not furnished all the boards needed. It was a part of the duty of appellee and his co-servants to look after and make these bridges where and when they were needed. The proof shows that during his last employment he had been engaged in this same service of moving heavy material

over these tracks and bridges made with loose boards, for about ten months, and that under a former employment he had worked for appellant about two years in the same employment, using the same appliances in the same manner. Appellee swears that he knew when he entered the employment on both occasions how the work was done, and how the bridges were made, and that he was perfectly familiar with it during his whole employment.

There is no proof that appellant was ever requested to furnish any better or different bridging for the pits, or that any complaint was made by appellee or his co-servants in that respect.

We think it very clear upon plaintiff's own testimony and the testimony of all his witnesses, that there are at least two grounds which bar his right of recovery.

First. It seems to us clear that appellee's injury was the result either of his own or of his co-servant's or their joint carelessness. We can not seriously doubt but that, if plaintiff himself, who was leading and guiding the course of the cart, had watched its course, or the wheels on the boards, he could have so guided it as to prevent its wheels from running off the boards, or running between them. But from his own testimony he was paying no attention to them, but was looking forward, and pulling the cart.

Those of his fellow-servants who were behind and pushing the cart were equally negligent. It seems clear that any of them could have seen where the wheels were running, if they had paid the slightest attention. It would have required no extraordinary care or skill to have kept the wheels of this cart substantially in the middle of a twelve inch plank, in going a distance of only four feet, and it was an act of gross carelessness for the men in charge of that cart in broad day-light with its heavy load, to allow it to run off its planks, and drop into the pit below. The law is too well settled in this State to require argument or authority to show that there can be no recovery had by one whose own gross negligence or that of his co-servants in the same line of employment, has caused the injury, or materially contributed to it.

Second. If the company was negligent in not providing safe bridging for the excavations between the tracks, as alleged in the declaration, or if the work was necessarily and ordinarily hazardous, as carried on in the shops of appellant, and appellee continued in the service with full knowledge of the alleged negligence of the company, or of the hazardous character of his daily work, without any promise of the company to remedy them, then he can not recover for an injury caused by such negligence of the company, or from the hazardous character of the work. In case of the alleged negligence of the defendant, long persisted in by the defendant, appellee is presumed to have acquiesced in it, and taken his chances. In case of the ordinary and usual hazards of the employment, appellee is presumed to have contracted with reference to them. These principles have been held to be the law by a long line of decisions in this State, and can not be regarded as open questions. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Rail Road Co. v. Britz*, 72 Ill. 257; *Simmons v. Railway Co.*, 110 Ill. 34; *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

The evidence in this case brings appellee clearly within the rule announced. If there was carelessness or negligence on the part of defendant or hazard in the nature of his employment, he knew all about both, and had known it for nearly three years. No promise was ever made by the company to change the methods of doing the work, or to do anything to make the work less hazardous, or to make any other kind of bridging for the pits.

Appellant insists that the court erred in giving several instructions for appellee, and in refusing some offered by appellant. We think this complaint is well grounded.

The third instruction given for plaintiff declares that "a person in charge of and directing a gang of men, with power to give them orders and exact obedience, is not in law a fellow-servant, * * * with the men under his charge." Whether this instruction announces a correct rule of law in the abstract is not necessary to determine, but we think it had no proper place in the case because there was no evidence to which it could properly apply. There is no evidence to show

that the foreman gave any directions or orders about how this load should be moved, except to say where it was pushed over one of the rails, "Give it to her, boys." This instruction was well calculated to mislead the jury and ought not to have been given.

The fourth instruction was erroneous, because it informed the jury that it was the duty of the company to furnish reasonably safe machinery, etc. This would make the company a guarantor of the reasonable fitness and safety of its machinery in all cases. This is a higher degree of care than law requires. The company was bound only to use a high degree of care in providing safe machinery and appliances for its employes and servants.

In *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, it is held that the law only imposes upon the employer the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery. *Shearman and Redfield on Negligence*, Secs. 87, 92; *North Chicago Rolling Mills v. Monka*, 4 Ill. App. 664. We should not reverse for this error if there were no other, because the court announced the same rule of law to the jury in defendant's seventh instruction at defendant's request, and defendant can not complain of an error committed also by itself.

The fourth instruction was also erroneous because it entirely ignored the fact that plaintiff knew all about the alleged negligence of the defendant and of the hazard of his work, and continued in this employment with full knowledge of both without objection, and without promise on the part of the company to remove the hazard or correct the negligence. The instruction told the jury that if they believed the defendant had been negligent in respect to the matters alleged in the declaration, then the plaintiff could recover, notwithstanding the uncontradicted facts showed that plaintiff could not recover under the cases above cited. This was error.

We think the court erred in refusing to give the jury the first, second, fourth, fifth, sixth and seventh instructions asked by the defendant. They announce a correct rule of law and

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are in harmony with the cases we have before cited, and were applicable to the facts in the case, and it was error to refuse them.

For the errors above pointed out the judgment is reversed.

Judgment reversed.

As a result of the finding of this court of the facts differently from that found in the court below, we find the following facts to be incorporated in the judgment of this court:

1st. The appellant was not guilty of either of the several acts of negligence charged in either count of the declaration, in manner and form therein charged, and we further find that there is no evidence in the record tending to show that the appellant was guilty of the negligence charged in either count of the declaration, in manner and form as therein charged. We further find that the injury to defendant complained of in the declaration was caused and received by him on account of his own negligence, and that of his fellow-servants in the same line of employment with him.

WILLIAM D. NICHOLS

v.

JOHN M. MURPHY ET AL.

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Partnership—Assets—Res Adjudicata—Estoppel.

1. A valid decree winding up a partnership and declaring certain patents partnership assets, is a bar to a suit by one of the partners to establish his claim to the patents as individual property.

2. A partner, who, without objection, on the winding up of a partnership under a decree, allows property to be sold as partnership assets, and the money to be paid therefor, can not afterward assert that it was his individual property.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

Messrs. BOTSFORD & WAYNE, and SHERWOOD & JONES, for appellees.

C. B. SMITH, J. This is an appeal from a decree of the Circuit Court of Kane County. In December, 1883, appellant and John M. Murphy entered into a copartnership, to continue ten years, to manufacture wind and feed mills, under the name of Nichols & Murphy. Murphy and Nichols were each the owner of certain patents in their own right, and by the terms of their contract of partnership each one was to put in the firm the right to *use* their respective patents during the existence of the firm. The right of the firm to use these patents was a part of the assets of the firm.

After this firm had existed for about ten years it was decided to enlarge its business, procure more capital and take in C. H. Geister as a new partner. In order to accomplish that purpose the business of the old firm was closed up and an inventory taken of its property, debts and assets, and two schedules, marked "A" and "B," describing all the property, of every kind, which Nichols & Murphy were to put in the new firm against the money and property to be put in by Geister, were made. No controversy arises or exists about any of this property or the schedules, except as to the patents claimed by Nichols, in this proceeding; nor are the rights of Nichols or Murphy in their first partnership in any manner involved in this suit. Schedule "B," above referred to, contained in detail all the resources of Nichols & Murphy which they were to put into this new firm as their part of its working capital, showing a net sum, after deducting liabilities, of \$11,080.32; to which was added "For patents and business," \$6,000; total, \$17,080.32. This amount represented the capital in the new firm put in by Nichols & Murphy.

Geister made up his share of the capital by putting in property and \$3,000 in cash.

After this new firm had continued in business for about two years, appellant, Nichols, filed a bill to wind up the affairs of

the partnership, and made his copartners defendants. Pending this litigation a receiver was appointed to take possession of the assets of the firm, collect its debts, and to sell its property and bring the proceeds into court. In his bill Nichols insists that he is the absolute owner of his patents, and alleges they are very valuable, and that in the formation of the new partnership he only put in the *right* to use his patents during its existence, the same as he had done in the prior firm of Nichols & Murphy. The answer of Murphy and Geister denied this claim of ownership of these patents by Nichols, and they insist that the new firm became the equitable owner of all these patents—as well those owned by Nichols as those owned by Murphy—by virtue of schedule “B,” and that they are a part of the assets of the firm.

Upon a hearing of this bill, the court ascertained the rights of the various parties under the partnership agreement and rendered its decree, and, among other things, directed its receiver to sell all the goods and assets of the firm, “and the interest of Nichols, Murphy and Geister in any and all patents belonging to said firm, at public auction to the best bidder.” In obedience to this decree the receiver proceeded to advertise and sell the property and assets of the firm, including all the patents owned by either Murphy or Nichols.

At this sale the Elgin Wind Power and Pump Company became the purchaser of all the property, paying something over \$40,000 for it. After paying the debts of the firm there remained about \$27,000 to be divided among the three members of the firm, which was afterward done by order of the court, and each received his just proportion out of the proceeds of this sale, which included the sale and proceeds of these patents now claimed by Nichols. That decree still remains in full force, and has been fully executed.

After the foregoing proceedings were had on appellant Nichols’ bill to close the partnership, and the Wind Power and Pump Company became the purchaser of the assets and property of the firm, the Wind Power and Pump Company came into the suit as an intervenor, and set up its purchase, under the decree of the court, of the patents, among other

things, and alleged that notwithstanding such purchase under the decree, that Nichols was claiming still to be the owner of such patents, and pretending that his title to such patents did not pass by such sale, and that he was still the owner of the same. The intervenor asked the court to adjudicate upon that question and to declare it to be the equitable owner of such patents, and require Nichols to convey all his legal rights, by deed to them, in and to such patents. Nichols answered this petition, and set up his claim to the title in those patents, and denied that the purchaser obtained any title thereto by or through their purchase, and averred that by virtue of his contract of partnership with Murphy and Geister he only conveyed to that firm the right to *use* his patents during the existence of the firm, and that when the firm ceased to do business the title and right of possession and use of his patents returned to him. Upon the hearing of this petition the court found against the claim of Nichols, and decreed according to the prayer of the Wind Power and Pump Company, and directed Nichols to execute a proper conveyance to the Pump Company, conveying all his title and right to the company. From this decree Nichols appeals to this court, and insists that the court erred in rendering the decree.

In the view we take of this case it is necessary to examine but a single question, and that is whether appellant can now raise the question he here seeks to litigate. The decree of the court upon his own bill found these patents, of which he now claims to have been the owner, the property and a part of the assets of the firm of Nichols, Murphy & Geister, and directed them to be sold as such. They were sold, and the proceeds of the sale divided between the members of the firm, including appellant. That decree declaring the title to be in the firm stands in full force and fully executed, and binds all the parties to it until it is set aside. That Nichols can not now again litigate that question in the face of that decree, seems to us too plain for argument. Nor can he go behind it and again litigate, or raise the same questions which were decided by the court in that case.

But, aside from the conclusive effect of that decree against

Nichols v. Murphy.

him, there is another equally strong reason which bars his recovery. He permitted these intervenors to buy this property at his own sale, under a decree obtained in his own suit, knowing that they were buying these patents, without objection, and without making his claim to them known until after the Pump Company had bought them and paid its money for them, and he had his share of the purchase money for these very patents safely in his pocket.

He is estopped now to claim the patents; he kept silent when it was his duty to make known his claim (if he had any), and he can not now be heard to set up his claim to the detriment of others whom he misled by his silence to place themselves in a position to their detriment which they would not have occupied had he then made known his claim. *Ball v. Hooten*, 85 Ill. 159; *Kinnear v. Mackey*, 85 Ill. 96.

Very much of the argument submitted by counsel for appellant would have been appropriate and applicable if we were reviewing the decree authorizing the sale of the partnership assets, including these patents, but is wholly foreign to the subject and decree we are now reviewing. Counsel insist that the court erred in entertaining this intervening petition, but this objection is not well taken. This position is recognized and approved in *Marsh v. Green*, 79 Ill. 385, and in *Phillips v. Blatchford*, 20 Ill. App. 608.

It is also urged that the court erred in proceeding to hear the rights of the parties without making Cooper a party, who, it is alleged, had some interest in these patents.

But that question is not made in the assignment of errors, and even if there was any force in the objection we can not consider it.

Seeing no error in this record the decree is affirmed.

Decree affirmed.

THOMAS CONNELLY, JR.,

V.

THOMAS CONNELLY, SR.

Mortgages—Cancellation—Evidence.

In a suit to cancel a mortgage and note thereby secured, held by defendant as assignee, which complainant alleges were paid by defendant out of money received by him in conducting complainant's business, this court sustains a decree for complainant.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. E. MEERS, for appellant.

Mr. J. T. DONAHOE, for appellee.

UPTON, P. J. Prior to July 1, 1885, the complainant had purchased, and was occupying with his family as a homestead, the following real estate, viz.: sub-lot 6, and the south twenty-two feet of sub-lots 7 and 8, in Osgood's subdivision of lots 6 and 7, in block 1, in school section addition to Joliet, in Will county, Illinois, with the buildings and improvements thereon.

This property was incumbered by a mortgage for purchase money to one Patrick Fahey, dated March 30, 1885, executed by complainant and his wife (including homestead waiver) and duly recorded. The mortgage was given to secure a note of the complainant, given in part for the purchase money of said property, for the sum of \$2,000, of even date with the mortgage, payable on or before three years from the date thereof, with interest at six per cent per annum.

The buildings situate upon the premises had been fitted up by the complainant as a residence for his family, a boarding-

house and saloon, at considerable cost and expense to complainant.

The boarding house was managed and conducted by complainant's wife, at her instance and request, and she received the moneys derived therefrom.

The complainant, on the 1st of July, 1885, opened his saloon in the said building, paying a license therefor for one year, amounting to the sum of about \$1,027.50, with his own means.

The license, for the sake of convenience in giving the bond required, was taken in the name of the defendant, who is a son of the complainant, by consent of all parties in interest.

The complainant personally managed and conducted the saloon, made the purchase of necessary stock and furniture therefor for about two months, the money obtained therefrom being used for the support of complainant's family and to pay off the said mortgage debt, when the defendant, claiming that the complainant was addicted to the use of intoxicating liquors to such an extent as to render him unfit to conduct the business in the saloon, forcibly took the keys of the saloon from the complainant, took charge thereof and carried on the business thereat, excluded complainant from all participation in that business, and from thence until the hearing below continued to carry on the business on his own account therein, paying no rent for the saloon property to complainant, or any one in his behalf.

From the proceeds of the business and the profits therefrom accruing the defendant paid the note of \$2,000 so given by the complainant, and caused an assignment thereof to be made thereon in blank, and took the said mortgage into his own possession, without cancellation or release thereof or offer to surrender the same to complainant, and claims and still insists that he is the rightful holder and owner thereof, and threatens to enforce the collection of said note against complainant out of the mortgaged estate.

The court below found, upon the hearing (and we are entirely satisfied with that finding), that the taking posses-

sion of the saloon by defendant was in its inception a family affair, and done with the intent and purpose of protecting all parties in interest, and, by so doing, to enable and insure the payment of the mortgage indebtedness, and save the mortgaged premises as a homestead for the family and the complainant.

It appears that in conducting business at the saloon the defendant kept no books of accounts, and he claimed and insisted in the trial court that he conducted the business on his own account, and that complainant had no rights therein, and that he was in no manner bound to render any account thereof.

It further appears that the complainant knew that the defendant was conducting the business, with the aid and assistance of the younger children of complainant's family, and made no request that books of accounts be kept of the business, and that the defendant, when he entered into said business, had no experience therein, and but little pecuniary means to carry on the same. That the assistance rendered to the defendant in conducting the business by the members of the complainant's family was wholly without compensation asked or paid therefor, and the business was remunerative and profitable.

The bill and its amendments and the prayer thereof sought to compel the defendant to cancel the said mortgage of \$2,000 and release the lien thereof upon the property therein described, and that the defendant cancel and deliver the note thereby secured to complainant, and render an account of his receipts and disbursements in conducting the saloon, etc.

The answer traversed the allegations of the bill, and denied complainant's equities as stated therein, or his right to have an account as therein prayed, and insisted that complainant was indebted to him, etc. On replication filed, the Circuit Court, after full hearing, found that the transaction was a family arrangement in which complainant acquiesced, in its inception, and that no account was kept by the defendant of the amount of money paid or received in the saloon business, or what part had been used and expended in the support of complainant's family, and that complainant knew of that fact

and acquiesced therein; decreed that the complainant was not entitled to an accounting, but was entitled to a cancellation and surrender of the \$2,000 note, and the release of the mortgage given to secure the same; which surrender, cancellation and release was decreed to be made by the defendant within thirty days, etc.; from which finding and decree an appeal was taken to this court.

The errors relied upon in the contention before this court are that the trial court erred in entering the decree, and that the same is unjust and contrary to equity.

It will be observed that the defendant below (appellant) did not ask for an accounting; indeed, in his answer he strenuously insisted that he was in no manner liable to account to or with complainant, and that it would be inequitable and unjust to require him to account. We think the appellee (complainant below) would be justified in calling for an account, *but he is not complaining*; certainly it seems to us the appellant is not in a position now to complain that an account was not taken.

We have examined this record with care, and we think the business transacted in the saloon was the business of and belonged to complainant (appellee), with the profits therefrom derived.

The complainant owned the building, fixtures and property in which the business was conducted; paid \$1,027.50 for the license with which to commence it, besides the rent of the saloon, for which he has not been paid, either in whole or in part. This, with what would have been the equitable profits of the business without payment of rent, as shown by the facts and circumstances in the record before us, would amount to a much larger sum than the price paid by the defendant for the mortgage and note, and have allowed the defendant sufficient wages for his service in conducting the business; besides, we think the Circuit Court did ample justice to all parties in treating the transaction as a family arrangement, and the money paid for the note and mortgage by the defendant as the money of the appellee (complainant); and that in equity and justice the Circuit Court did not err in decreeing the can-

cellation and surrender of the \$2,000 note and the mortgage to the complainant, and decreeing that said note and mortgage was paid, and should be released and discharged of record.

Finding no error in the proceedings and decree of the Circuit Court, the same is affirmed.

Decree affirmed.

STEPHEN BLAIN AND JEAN E. LAFOND

v.

THEODORE M. MANNING.

Chattel Mortgages—Rights of Assignee—Possession—Jurisdiction.

1. The assignee of past due notes secured by a mortgage on domestic animals, the possession of which remains in the mortgagor, takes the notes subject to the claim of an agister, or person who keeps, feeds or pastures the animals, for his charges.

2. Where, after part of the evidence has, by stipulation of the parties, been heard by the judge while sitting in another county, the cause is again called for hearing and determined in the proper county, objection that the cause was partly heard without the jurisdiction of the court can not be raised for the first time on appeal from the judgment.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

Mr. B. M. SHAFFNER, for appellants.

Mr. T. M. MANNING, for appellee.

LACEY, J. This was an action of replevin brought by appellants against appellee to recover the possession of two horses and a road cart. The appellants claimed the goods and property by virtue of a chattel mortgage, executed by A. K. Manning, brother of appellee, to Belle Goodselle Baldwin, through

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her husband acting as her agent. The appellants became the owner of the notes and mortgage by assignment May 12, 1888. The appellee, from whose possession the property was taken by the writ of possession, claimed it by virtue of an asserted lien for agisting and finding the stock to the amount of \$251.88, and he kept the property for hire and the service of his horse to the two mares. The cause was finally heard by the court below without a jury at its September, 1889, term, and resulted in the court finding the issues joined for the defendant and no damages, the right of possession being the issue, and the court rendered judgment for the defendant, with damages of one cent, and ordered a writ of *retorno habendo* to issue for the property replevied.

Motion by appellants for new trial being overruled and judgment rendered on the verdict they bring the cause here by appeal.

The mortgage was given ostensibly to secure two promissory notes for \$350.06 each, bearing even date with the mortgage, which bore date August 26, 1887, and were due as follows: one in four months from date, and the other two years from date. It appears that the mortgage was fraudulent to at least the extent of the last note, and to \$25 included in the first note. The last named note was given, it appears from the evidence, for the purpose of enabling the mortgagor to cover up his property, he being in litigation with his wife in a divorce proceeding. There is also a question in the case whether the mortgage was void by reason of its not being acknowledged in the township where the mortgagor resided. It is somewhat doubtful whether or not the mortgagor resided in the town of West Chicago, the place of the acknowledgment, but as we view the case, it will not be necessary to pass on this question. The note first falling due was long past due when sold to appellants and was the only one having any valid consideration, and this had been paid in part by the mortgagor, there only remaining due on it at the time of replevin a sum of from \$231 to \$287.

We therefore need take no notice of the second or fraudulent note, but treat it as though it were not in the mortgage, even though the mortgage could be held valid as to either.

The evidence shows that the property was allowed to remain with the mortgagor and appellee for nearly a year, or until this replevin October 8, 1888, after the first note became due. The appellee was the owner of a farm and living on it in Du Page County, Ill., and the mares included in the mortgage were taken to his farm, there to be agisted and bred and cared for by appellee; and besides this, the mortgage gave the mortgagor liberty by separate stipulation to take the mares anywhere he pleased, thus enabling him to get credit of persons on the security of the property who were in ignorance of the existence of any mortgage. One mare was taken to appellee's farm in September, 1887, and the other August 11, 1887, and the cart and "Peregrine" afterward. The price of breeding was \$50 for each mare. The statute provides that "any person shall have a lien upon the horses and carriages and harness kept by them for the proper charges due for the keeping thereof, and expenses bestowed thereon at the request of the owner or the person having the possession thereof." Also: "Agisters and persons keeping, yarding, feeding or pasturing domestic animals shall have a lien upon the animals agisted, kept, yarded or fed for the proper charges due," etc. S. & C. Annotated Statutes, pages 15, 32, par. 49, 50.

It would appear from the above statute that the lien of appellee was valid both as against the mortgagor and the appellants, the assignees of the mortgage. And we may say, without such a statute the appellee would have a lien on the property in his hands and a right to retain the possession thereof until his debt against the mortgagor was paid. A mortgagee in this State must take possession of the mortgaged property the next day after the running of the days of the grace after note and mortgage matures, if there is nothing to prevent, and within a reasonable time at all events. *Reed v. Eames*, 19 Ill. 594; *Atkins v. Byrnes*, 71 Ill. 326. The appellants herein knew when they purchased the notes that nothing was due on the second note; that it was fictitious. The appellants can take no greater rights by their assignment as against appellee than the original mortgagee could have had in case she had retained the ownership of the notes.

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The mortgage being fraudulent and past due at the time the most of appellee's claim accrued, the appellants have no right to recover without paying his claim.

The appellants insist that the trial court lost jurisdiction on account of hearing a part of the evidence in Chicago. It appears that when the trial was entered upon at the March term, 1889, a jury, by agreement, was waived, and the cause partly heard, when the record shows, by stipulation of parties, the cause was continued and the remainder of the evidence was to be heard at chambers; the remaining testimony was so heard at chambers, in Chicago, without objection, and, at the September term, 1889, of the Circuit Court, in Du Page county, the cause was again brought on for hearing, and plaintiff and defendant were present by their respective attorneys, as shown by the record, and the judgment recites that the evidence was heard in Chicago, by the stipulation as agreed, and thereupon the court rendered judgment. No objection was made to the court passing on the case on the evidence so heard or exception taken; and the bill of exceptions shows that all the evidence was heard on the trial of the case. That must have been at the time when judgment was rendered. If the evidence was taken in Chicago, it was so taken and preserved by the official reporters and then submitted to the court at the trial, as the bill of exceptions shows, and no objection or exception was taken or made to hearing the evidence so taken. Nor was any such ground assigned on motion for new trial.

It is too late to make any such objection here for the first time, even if it could be allowed, after the solemn stipulation of the parties. No question of jurisdiction can arise, as the cause was finally heard in open court.

Finding no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

Judge URON, having tried the case in the court below, took no part in the hearing in this court.

WILLIAM H. REYNOLDS

v.

L. E. BARNARD.

Negotiable Instruments—Note—Principal and Surety—Release of Surety—Extension—Judgment.

1. It is error to set aside a judgment by default against joint defendants as to one of them only, and, upon his pleading and the issues being found against him, to enter a separate judgment for a different amount against him, leaving the judgment by default to stand against the other defendant.

2. An agreement between the maker and payee of a note after maturity, without the knowledge and consent of the surety, to extend the note for a certain time in consideration of the maker's keeping the money thereby secured for that time, and paying interest thereon at the rate specified in the note, releases the surety.

3. Under the statute of this State it is not necessary that an agreement to extend the time of payment of a promissory note be in writing.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Knox County; the Hon. A. A. SMITH, Judge, presiding.

Mr. GEO. W. THOMPSON, for appellant.

"There is no warrant in law for rendering separate judgments for different amounts against defendants severally when sued in a joint action upon a contract and all are served with process."

"When a judgment by default against two defendants was set aside as to one, and a trial had, and a judgment rendered as to him for a less sum than the judgment against the other, *held*, that the proceedings were erroneous, and that the default should have been set aside as to both, and on the trial damages should have been assessed against both and judgment rendered thereon." Gould v. Sternberg, Adm'x, etc., 69 Ill. 531; Faulk v. Kellums, 54 Ill. 189; Flake v. Carson, 33 Ill. 518; Stewart v. Peters, 33 Ill. 394; Briggs v. Adams, 31 Ill. 486; Gribbin v. Thompson, 28 Ill. 61; Fuller

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v. Robb, 26 Ill. 246; Dow v. Rattle, 12 Ill. 373; Davidson v. Bond, 12 Ill. 84; Howell v. Barrett, 3 Gilm. 433; Wight v. Meredith, 4 Scam. 360; Russell v. Hogan, 1 Scam. 552; Logan v. Burr, 3 Ill. App. 458; Enterprise Distilling Company v. Bradley, 17 Ill. App. 509; People v. McFarland, 9 Ill. App. 275; Felsenthal v. Durand, 86 Ill. 230.

Where the payee of a promissory note makes a binding agreement with the principal debtor, without the consent of the surety to extend the time of payment of the note, the surety is thereby discharged from his liability. From the multitude of cases on this point we only cite a few: First National Bank of Winona v. Pierce et al., 99 Ill. 272; Brandt on Suretyship, 455; Warner v. Campbell, 26 Ill. 282.

A contract between the payee and the principal debtor in which the payee agrees to extend the time of payment of the note a definite period, and the debtor agrees to retain the money for that definite period and pay interest thereon at the rate mentioned in the note, contains all the elements of a binding contract, and there is a valuable consideration to both. The payee secures his interest for such period and the debtor relinquishes the right to pay the debt and stop the interest and gets the use of the money. Crossman v. Wohlleben, 90 Ill. 537; McComb v. Kitteridge, 14 Ohio, 351; Wood v. Newkirk, 15 Ohio St. 295; Fowler v. Brooks, 13 N. H. 240; Davis v. Lane, 10 N. H. 156; Chute v. Pattee, 37 Me. 102; Robinson v. Miller, 2 Bush (Ky.), 189; Stallings v. Johnson, 27 Ga. 564.

Mr. CHARLES S. HARRIS, for appellee.

This court can enter the proper judgment in this case, and then affirm it; or it can remand it to the Circuit Court with directions to that court to enter the proper judgment. Section 81, Practice Act; Thomlinson v. Earnshaw, 14 Ill. App. 593; Masters v. Masters, 13 Ill. App. 611; West Chicago Alcohol Works v. Sheer, 104 Ill. 586; Church v. Jewett, 1 Scam. 55; Peck v. Stephenson, 5 Gilm. 127.

An extension of time given the principal debtor by the creditor will not release the surety unless the two make a

binding agreement to which the latter has not expressly or tacitly consented, "which materially changes the terms of the original contract." The surety is only released from liability "when a new contract has been made," to which he is not a party.

Such agreement must be founded on a good consideration and be binding on the parties to it. It must suspend the right of action on the part of the creditor. *Waters v. Simpson*, 2 Gilm. 570-4; *Gardner v. Watson*, 13 Ill. 347-352; *Galbraith v. Fullerton*, 53 Ill. 126-7; *Villars v. Palmer*, 67 Ill. 204; *Newell v. Waller*, 12 Ill. App. 306; *Byles on Bills*, 136 (star p.); *Crossman v. Wohlleben*, 90 Ill. 537.

Appellant relies on the agreement of Marsh to keep the money six months and pay eight per cent interest on it as the consideration for the agreement of appellee to extend the time of payment. If such an agreement had been made (which I think appellant has failed to prove) it would not have been binding on the parties to it unless it had been reduced to writing. Sec. 4, Chap. 74, R. S.

C. B. SMITH, J. This was a suit brought upon a promissory note payable to L. E. Barnard and signed by A. H. Marsh, principal, and Wm. H. Reynolds as surety. The note was for \$600. The summons was returnable to the June term.

Both defendants were sued and both served in due time. On the first day of the term, the defendants, in default of a plea, were defaulted, and the damages assessed against them both at \$649.33, and judgment entered upon the assessment. On the second day of the term appellant Reynolds appeared and moved the court to set aside the judgment and the default, and asked leave to plead. The court allowed the motion and set aside the judgment and the default as to Reynolds, only leaving it stand as to Marsh.

Reynolds pleaded the general issue, and two special pleas setting up that he was surety for Marsh on the note, and that Barnard knew that fact at the time of the making of the note, and that after the note became due and payable, Barnard

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extended the time of payment to Marsh for six months, and that Marsh, in consideration of the extension, agreed to keep the money the full term of six months and pay eight per cent interest thereon, and that such agreement for such extension was made without the knowledge or consent of appellant, and upon a valuable and sufficient consideration, whereby appellant was released. Issue was joined on these pleas, a jury waived and a trial had before the court, which resulted in the court finding the issues for the plaintiff and assessing his damages at \$654.67, and a separate judgment was rendered against Reynolds for that amount.

The court overruled a motion for a new trial and appellant now appeals to this court and brings the record before us and assigns errors upon it.

The first error assigned is that the court erred in rendering separate judgments for different amounts against joint and co-defendants, upon a joint cause of action, when they were both sued jointly and served to the same term.

This error is well assigned; such a judgment is erroneous.

The correct rule of proceeding in such case is laid down in *Gould v. Sternburg*, 69 Ill. 531. The judgment against both should have been set aside and the default only allowed to stand as to Marsh, and, in case Reynolds was found liable on the issues joined as against him, then the same amount of damages assessed against him should have been assessed as to both the defendants, and judgment for the same amount be rendered against both.

In case Reynolds succeeded in the defense interposed, which was personal to him, then the original assessment and judgment on default, as to the defendant Marsh, should have been restored as against him. *Faulk v. Kellums*, 54 Ill. 189; *Distilling Co. v. Bradley*, 17 Ill. App. 509.

It is also assigned as error that the court erred in holding as law the sixth proposition submitted by plaintiff, and in refusing to hold as law the first and second propositions submitted by appellant. The first and second propositions asked by the defendant to be held and refused by the court, are as follows: "Refused. 1. If the court believes, from all the evi-

dence, that W. H. Reynolds was only a surety on the note sued on and received no part of the consideration for the making of the note, and that Barnard, the plaintiff, knew before advancing the money on said note that Reynolds was only a surety on said note, then if the court further believes that on the 23d day of May, 1888, Barnard, the payee, made an agreement with the principal maker of the note, Marsh, that he would extend the payment on said note six months or to November 23, 1888, and at the same time Marsh, the maker, agreed to retain the money due on said note and payment on the same at the rate specified in said note from the 23d day of May, 1888, to the 23d day of November, 1888, or for six months from May 23, 1888, and that such agreement for extension was made without the knowledge or consent of the surety, Reynolds, then, as a matter of law, the court holds that such agreement for extension and payment of interest for such time is such an agreement as would in law release the surety, Reynolds.

"Refused. 2. The court holds as a matter of law that an agreement between the payee of a note and the principal maker of the note, made after the note was due, wherein the payee agrees to give the principal maker an extension for six months, and that the note is not to be paid for six months from a certain day, and at the time of making the agreement for extension the principal maker as a consideration for said extension agrees to keep the money secured by the note said time of six months and pay interest at the rate specified in the note to the payee, and that such agreement was made without the knowledge or consent of the surety, it being known to the payee at the time of making the original loan that Reynolds was only a surety, then such an agreement for an extension was such an agreement as would in law release the surety."

The evidence tended strongly to support the hypothesis of fact in these propositions and if they contained correct rules of law as applicable to the supposed facts then they should have been held as the law. We think both of these propositions announce a correct rule of law and if the facts relied on

were found to exist by the court, from the evidence, then the surety would be discharged. If the facts relied on were shown by the proof, then they establish a valid and binding mutual contract for an extension of time for six months for the payment of the note by the principal upon a sufficient and valuable consideration, and without the knowledge or consent of the surety.

It was a valuable privilege to the creditor to loan his money for six months longer than the note specified at the rate of interest therein named, and it was a valuable privilege secured by the debtor to retain the money six months longer than his note provided before he could be compelled to pay it. These two propositions of law based upon the supposed facts, fall directly within the rule announced in *Crossman v. Wohleben*, 90 Ill. 537, and *McComb v. Kitteridge*, 14 Ohio, 351, and constitute, if proven, a complete defense to the surety. The court erred in refusing to hold both these propositions as law under the proof in the case.

If we understand the sixth proposition held for the plaintiff below, it holds to a rule directly the reverse of what it stated in the propositions 1 and 2 above discussed, and should have been refused.

Under our statute it is not necessary to the existence of a valid contract to extend the time of payment of a promissory note that such extension should be in writing. The extension of time does not abrogate the written obligation so as to make an entire new contract resting in parol, but has only the effect of extending the time of payment fixed in the note to a day certain in the future for its enforcement. Or, in other words, the new agreement is one not to abrogate and destroy the note, but to postpone its enforcement according to its terms for a definite time for a valuable consideration.

For the errors above indicated the judgment is reversed and remanded.

Reversed and remanded.

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137s	547

WILLIAM BROCKHAUSEN

v.

FREDERICK BOEHLAND ET AL.

Highways—Abandonment—Bridges—Damages—Evidence.

1. Abandonment of a highway is not a question dependent upon the length of time of its *non-user*, but is to be established like any other question of fact.

2. The acquisition by the public of another road as a public highway, to take the place of one which has been obstructed, is an abandonment of the latter.

3. Where a person cognizant of the fact accepts damages for injury to his property by reason of the abandonment of a highway which has become obstructed, and the opening of a new one, such damages will be presumed to include all damages which may result to him therefrom.

4. The decision of the public authorities as to whether the substituted highway is more convenient for the public than the old one is binding on the courts.

5. Where a bridge is erected by the public authorities on a public highway only for the purpose of travel, they may remove it upon abandonment of the road as a highway.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Stephenson County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Mr. J. A. CRAIN, for appellant.

Non-user of the old road and bridge "for about a year" is no abandonment of it.

In *Town of Lewiston v. Proctor*, 27 Ill. 413, it was attempted to be shown that the public had acquired another and different road, which accommodated the same travel, and that there had been an abandonment in that case; the court held that the defendant had entirely failed, as the evidence abundantly showed (as appears in this case) that the road was continuously used up to the time of the obstruction. "When," say the court, "an abandonment is relied upon, it must be clearly and satisfactorily proven, and that all use of it for a

public road has ceased for a sufficient length of time clearly to indicate the intention; a transient or partial non-user will not suffice."

At common law the doctrine of the earlier cases is that there can be no loss of the public right by non-user. A highway once established must remain such until changed or discontinued by process of law. Angell on Highways (3d Ed.), 430.

When a highway is once established as such by the action of proper authorities, it does not cease to be such, even though unused for many years, until it has been discontinued by the proper authorities; hence, if a new road is built near an old one, and the travel is wholly diverted from the old road, over the new one, unless the old road has been regularly discontinued it remains a highway, and neither the owner of the fee nor any other person can lawfully obstruct the same, any more than he could the new road. Wood on Nuisances, Sec. 299.

Mere non-user will not prevent the people from asserting their rights; it is only where a public highway has been abandoned for a great length of time, and another road has been opened, traveled by the public and recognized by the public authorities intrusted with the control of public highways, and repaired by them as such, that an abandonment may be presumed. Galbraith v. Littiech, 73 Ill. 212.

Mr. HENRY C. HYDE, for appellees.

The statements in the answer, if true, established that the portion of the old road, including the bridge in question, had been entirely abandoned, and another road in place of it legally acquired and adopted by the public, and that the bridge, therefore, was not in a public highway. It is believed this doctrine is fully sustained by the decisions in this State. Grube v. Nichols, 36 Ill. 92; Champlin v. Morgan, 20 Ill. 181.

On the hearing of the motion to dissolve the injunction, there was no attempt to dispute these statements in the answer, and there is nothing in the record, except the averments in the bill, to contradict them. Leave was not asked to amend the bill, and the court properly dissolved the injunction and dismissed the bill.

UPTON, P. J. The question presented in the record before us is whether the Circuit Court of Stephenson County properly dissolved the injunction, and dismissed the bill of complaint filed herein.

The case made by the bill is, as stated, that the complainant (appellant) was about to be injured and greatly damaged by the removal of an iron bridge spanning a stream which was alleged to be upon a public highway. The relief sought and prayed for in the bill was the injunction only. The bill set up that appellant was the owner of a farm in the town of Silver Creek in Stephenson county, located on both sides of Yellow creek in said town; that a public highway led through the farm and across the creek on an iron bridge, which stood in the highway; that the highway and bridge were necessary for complainant's free and convenient use of his farm, as well as for the public travel; that the appellees, as highway commissioners of the town, were about to take or cause to be taken down the bridge, and remove the same, and thus to prevent and obstruct the travel upon the said highway.

The sworn answers of the three commissioners (appellees) were filed in the case, in which they each specially deny that the bridge in question was in or upon a public highway. The answers further averred that the road in question led from the east line of the town of Silver Creek, due west to a point a few rods south of the bridge now in controversy, and then, as formerly traveled, turned north, crossing Yellow creek on said bridge, and extended north to a point sixty rods from the bridge, where it again turned due west and was the main traveled highway leading to Freeport, the county seat. That some two years prior to the commencement of the suit a railroad had been constructed over the complainant's farm, in such course as to cross the highway twice, near the point north of the bridge and at the point near where the same turns to the west, as above stated, thus forming a small triangle, with the highway on one side thereof, and the railroad on the other, and thereby making travel on the highway difficult and dangerous to the public. That in the spring of 1888, the commissioners of highways of that town, upon a

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petition duly signed, laid out a new road sixty feet wide from a point south of the old bridge, the one in controversy, at the point south of the bridge where the old road turned north to cross the bridge, going west, along the south side of the creek forty rods, thence in a northerly direction across the creek, to intersect the old road. That the complainant then appealed from the determination of the commissioners of highway to three supervisors of the county, who, upon hearing, affirmed the order of the commissioners laying out and changing the road, and thereupon appellees paid to appellant the sum of \$1,350, the damages agreed upon between the supervisors and the appellant, being in full for his damages in the change and relocation of the highway, at the point now complained of. That a new iron bridge was built with 100 foot span on the new road so laid out; that the new road was properly graded so that it in fact was a good road in all respects and was intended to be, as it in fact was, a part of the old road, and that for more than a year prior to the time of the filing of complainant's bill, the new road had been open for travel, and since such opening of the new road, the public travel had been thereon, and the old road over and across the old bridge had been discontinued and wholly abandoned by the public and is not intended to be again used by the public as a highway. Appellees insist and submit that as such commissioners of highways in such town, under the facts stated, they had and have the legal right to exercise their discretion as to the propriety and necessity of taking down and removal of the old bridge, and ask that the injunction be dissolved. The foregoing allegations of the answers were not particularly controverted, nor overcome by any evidence in the case.

Appellant filed three *ex parte* affidavits on the hearing of the motion to dissolve the injunction, tending to show the inconvenience and amount of damages appellant would sustain if the old bridge should be taken away and the old highway abandoned.

The cause was heard on appellees' motion to dissolve the injunction, upon the bill, sworn answers of appellees, replication and *ex parte* affidavits of appellant and others to the point

before indicated. The Circuit Court on hearing dissolved the injunction and dismissed the bill for want of equity at complainant's costs, and the case is brought to this court on appeal.

The error complained of is the dissolution of the injunction and dismissal of appellant's bill by the court below.

The sole contention here is, first, that the non-user of the old road and bridge for about a year, if shown by the evidence, does not constitute an abandonment; and second, that if this old road and bridge was in law and fact abandoned by the public as a highway, then such old roadway and bridge became the absolute property of the appellant, and the appellees, as such commissioners or otherwise, had no right to destroy or remove the bridge, or interfere therewith.

First. Abandonment of a highway is not a question of the time of its non-user, but is simply a question of fact to be established like any other question of fact in the case.

The case of *Champlin v. Morgan*, 20 Ill. 183, announces the rule of law to be, as the evidentiary fact, in a case like the one at bar, that if the public have acquired the legal right to another road to answer the purpose of one claimed to have been obstructed, that fact amounts to an abandonment of the road alleged to have been obstructed. So in this case, it is not disputed but that the public had acquired the legal right to another road and bridge to answer the purpose of the old ones, but had also acquired such new ones because the further use of the old road had become dangerous to the public by the crossing of railway tracks and moving cars thereon, and to avoid such danger the public had paid large sums of money, in obtaining the right of way for the new road, to the complainant, which right of way was expressly obtained and the new road and new bridge built at great cost, to protect the public from that danger, and was so built and constructed as a substitute for the old road and bridge, and when so built and constructed was adopted, traveled and used by the public. This of itself would amount in law to an abandonment of the old road and bridge by the public.

More, even, than this, in the laying out of this substituted new road, appellant must have been fully apprised of the facts,

and the objects and purposes for which the new road was sought, and consequently must then have known of the contemplated abandonment of the old road. He, at least, was chargeable with knowledge of the legal effect of such substitution, which, as we have seen, was the abandonment of the old road, and with it the bridge as a part of it. We find appellant under these circumstances contesting the laying out of the new substituted road, with zeal and earnestness, taking an appeal from appellees' action to the supervisors, and finally, as the averment in the sworn answers of appellees state, and which is undisputed by the evidence in the case, settles the damages agreed upon by himself and the appellate board of supervisors for the laying out of this new substituted road, and receives the sum of \$1,350, paid him therefor.

Under these circumstances, we think it but just to presume, as a legal intendment, that in adjusting and settling appellant's damages, all the damages he would sustain, not only in the building of the new road and bridge, but by the abandonment of the old ones, must have been taken into consideration and full compensation made therefor, as well as all damages which could accrue from inconvenience to appellant in that abandonment of the old road and bridge.

It was not a question to be considered and determined by the trial court, whether the substituted road served the public or private conveniences as well as the old one.

The public authorities having charge of highways are invested with full power and right to judge of the relative advantages of the two roads. If they believe that the one substituted for the other was preferable and better adapted for the public use and safety, that was sufficient.

It was for them and is not for the court to determine that question. The adoption of a new and the abandonment of the old one may not and could hardly be expected to so fully accommodate a portion who use it, as the old one, yet others, no doubt, would be better accommodated by the change. Thus the general object of the two roads would be the same, and the public authorities are the judges of whether it has been attained. The question for the court is whether the

change has been, in fact, made, and not the utility of the change.

This is the law as stated in *Grub v. Nichols*, 36 Ill. 99, and the principles announced seem to apply to the case at bar with unusual force, and is decisive of that question in this case.

Second. Of this point it is quite sufficient to say, there is no evidence in the record before us even tending to show that the complainant was the owner of the fee in this strip of land formerly occupied by the old road and bridge, and without being such owner he certainly could have no legal claim or right thereto.

We think that the old iron bridge belonged to the town in which it was located, and was subject to the control of the highway commissioners thereof for removal or sale, as in their judgment the inhabitants of said town and the public required, after the abandonment of the old road. It was intended, when the bridge was erected, to make that structure a part of the real estate upon which it was constructed, only so far as its use should be required for travel upon the road for and during the time the public should so use it.

In our judgment, the bill in the case at bar, seeking to enjoin the removal of the iron bridge from the old and abandoned road, was properly dismissed for want of equity, and the decree of the Circuit Court is therefore affirmed.

Decree affirmed.

PORTER E. CHAMBERLAIN

v.

JOHN BAIN.

Sales—Rescission—Evidence.

In an action for the price of goods sold, the sale of which defendant claimed to have been rescinded by mutual consent, this court declines to interfere with the verdict for defendant.

[Opinion filed May 28, 1890.]

Chamberlain v. Bain.

APPEAL from the Circuit Court of Winnebago County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Messrs. B. A. KNIGHT and N. C. WARNER, for appellant.

Messrs. J. C. GARVER and A. E. FISHER, for appellee.

UPTON, P. J. This cause was before this court on a former occasion, and its proceedings therein will be found reported in 27 Ill. App. 637.

The appellant brought suit in the court below against the appellee in an action of assumpsit to recover the alleged purchase price of twenty-four steers, bid off by appellee at an auction sale held by appellant for the sum of about \$25 per head. The price of the cattle so purchased at that sale by the appellee (as claimed by appellant) were to have been paid for in one year, by the note of the appellee, bearing interest at six per cent, with security to be approved by appellant. Appellee, however, insisted that by express contract made at the sale and before the purchase he was to give his own note with interest as stated, due in one year, without security, in support of which contention much evidence was given on the trial.

Appellee further claimed and insisted that the sale of the cattle was rescinded by mutual consent of appellant and appellee soon after the auction sale, and the facts in evidence seem to sustain this view.

Some three weeks after the auction sale, these steers were sold at private sale by the appellant to one Geo. Detmore, (and as appellant claims) for a less sum than the price bid therefor by the appellee at the auction sale. The auction was held late in the fall of 1884 or early winter of 1885. This suit was commenced to the April term of the Circuit Court, 1889. It will be seen on inspection of the opinion of this court on the former appeal before referred to, that one of the errors therein assigned and sustained by this court was that by the appellee's instruction No. 5, given the jury upon that trial, the trial court wholly ignored the issue presented to the jury,

viz., whether or not there had been a rescission of the contract of sale by mutual consent. Upon the retrial of the cause, that, and other errors for which a reversal and remand were directed, have been avoided and further proof heard upon the facts of rescission of the sale, and kindred questions, and the trial court properly instructed the jury in effect that the appellant could waive or rescind the sale to and with appellee, by mutual consent of the parties to such sale, and that if the sale was so rescinded the appellant could not recover in this action. It is objected, however, by the appellant, that even if this be conceded, appellant is entitled to recover, for the reason, as is claimed, that there is not sufficient evidence to establish such contract of rescission.

We have carefully examined the record upon this question and are satisfied that the jury were fully warranted in finding, as they did, that the auction sale of the cattle to the appellee was entirely rescinded by mutual consent of the parties thereto, soon after such sale, and long prior to the commencement of this suit; and in finding all the other issues in the case for the appellee upon which the court below rendered judgment, and as that question is decisive of this case (no error being perceived in the instructions given or refused), it could serve no useful purpose to refer to, or discuss other points sought to be raised by errors assigned upon the record before us. Finding no error in this record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

36 232
66 452

JOSIAH H. HENDERSON

V.

JOHN G. MILLER ET AL.

Sales—Fraudulent Misrepresentations—Replevin—Evidence—Instructions.

1. In replevin of goods sold, claimed to have been obtained through the purchasers' fraudulent misrepresentations as to their financial condition, it is error to allow plaintiffs, or their agent who sold the goods, to testify as to conversations between the agent and plaintiffs, in the purchasers' absence, concerning their statements.

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2. A private memorandum of the purchasers' financial condition, made by a member of plaintiffs' firm when on a visit to them, which is not shown to have been known to, or authorized by them, is not competent evidence.

3. Nor is it competent to prove a prior fraudulent transaction on their part, with which plaintiffs were not connected.

4. Evidence of the rating of a merchant by a commercial agency, not shown to have been authorized by him, is inadmissible.

5. The jury alone are the judges of the credibility of a witness, and an instruction which usurps this function is error.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Bureau County; the
HON. DORRANCE DIBELL, Judge, presiding.

Messrs. J. A. MCKINZIE and R. M. SKINNER, for appellant.

Messrs. NEWTON A. PARTRIDGE and GEORGE W. CRAWFORD,
for appellees.

C. B. SMITH, J. This was an action in replevin prosecuted by John G. Miller & Co. against J. H. Henderson, to recover goods of the value of \$2,803.11. John G. Miller & Co. were wholesale dealers in clothing in Chicago. Evans & Lindsay were retail dealers in clothing, in Buda, Illinois. In the spring of 1888, Miller & Co. (appellees) commenced selling Evans & Lindsay clothing; in February they sold them one bill for \$145, in April a bill for \$690, and in June a small bill of \$36. All these sales were on credit and not due until the first of September following.

On the 18th of August, Van Velzer, one of appellees' traveling salesmen, called at the store of Evans & Lindsay for the purpose of selling them more goods. After making inquiry of the firm of Evans & Lindsay as to their financial standing and ability to pay, and having received assurances from them (as he says) that they then only owed about \$600 outside of what they owed appellees, he sold them another bill of goods amounting to \$2,800. The bill was sent to the house of appellees at Chicago, and after Van Velzer had given Mr.

Watt, a member of the firm, and Mr. Dean, cashier of the firm, a statement of what conversation he had with Evans & Lindsay, they were satisfied with the sale and accordingly on the 24th day of August this \$2,800 bill of goods was shipped to Evans & Lindsay.

Charles D. Lindsay and John B. Evans composed the firm of Evans & Lindsay; one of them was the son and the other the son-in-law of Charles R. Lindsay, who is the real party defendant in interest in this case.

On the 5th day of September, about ten days after the bill of goods was shipped, Charles R. Lindsay had a judgment confessed for \$10,000 against his son and son-in-law (Evans and Lindsay) on two notes, one for \$8,500, and one for \$1,500, which he claimed was given him for borrowed money which he claimed to have loaned them from time to time to enable the firm of Evans & Lindsay to carry on their business. On the 6th of September executions were issued on this judgment, and levied on this \$2,800 bill of goods, which had just been bought of appellees and received at the store, and possession taken by the sheriff, Josiah H. Henderson, and on the 8th of September appellees filed their affidavit and began this replevin suit, claiming the title and right of possession of the goods. The declaration charged the sheriff with wrongfully taking and detaining the goods. The pleas were, 1, property in Evans & Lindsay, and 2, plea of justification, that he took them by virtue of an execution against Evans & Lindsay, etc.

A trial resulted in verdict for appellees, upon which the court gave judgment, after overruling a motion for a new trial. Appellant now brings the record before us on appeal and asks for a reversal, and assigns a great many errors. Appellees predicated their right to recover these goods upon the ground that Evans & Lindsay had procured them from appellees by fraud and misrepresentations, and that by reason of such fraud, Evans & Lindsay obtained no title. This contention was denied on the trial, by appellant.

Inasmuch as the judgment must be reversed for errors committed on the trial, we shall express no opinion upon the

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evidence of the case or upon the ultimate rights of the parties. On the trial below, the court permitted Van Velzer to testify as to his conversation with Watt and Dean in Chicago, and to repeat to them what he said Evans & Lindsay told him concerning their financial standing when the order was taken. The court also permitted both Watt and Dean to testify what Van Velzer told them when he brought in the order, concerning what he had been told by Lindsay & Evans as to their financial standing, and the amount of their indebtedness. To all this testimony appellant, at the time, objected; but the objection was overruled. The admissibility of this evidence was error. The fraud complained of was the alleged false and fraudulent statements made by Evans & Lindsay to Van Velzer, at their store, concerning their financial standing, in order to induce Van Velzer to sell them the goods. Whatever fraud, if any there was, was committed then and there, and not at Chicago, or anywhere else. Conversations had with Van Velzer at Chicago, with his principal, in the absence of Evans & Lindsay, were no part of the *res gesta*; and anything there said could in no manner change or affect the alleged fraud used to procure the order at Buda. As to Watt and Dean, it was purely hearsay. Van Velzer could not strengthen his testimony, nor multiply witnesses by repeating it to others, in the absence of the parties to be affected by it. Such testimony was well calculated to induce the jury to suppose there were three witnesses to the alleged fraudulent purchase instead of but one. If, in fact, the alleged fraud was perpetrated upon Van Velzer, whereby he was induced to get the order filled by his recommendation, and that the goods were thus procured by Evans & Lindsay, it would be a matter of no importance what took place at the house in Chicago. Van Velzer stood as the representative of the house he represented when he took the order, and if the goods were so fraudulently obtained through Van Velzer, the vendor could recover them without showing that the principal had any information on the subject at the time of parting with the goods.

It is also objected that the court erred in permitting what

was called a "credit slip" to be read in evidence to the jury against appellant's objection. This credit slip seems to be a little memorandum made out on a blank printed for that purpose, which contains a statement of the financial condition of Evans & Lindsay on the 21st day of February, 1888, made by Mr. Miller, one of the firm, on the occasion of one of his visits to Buda, but it is not signed by Evans & Lindsay, or either of them, and it does not appear that they authorized it to be made or that they knew it was made, nor that it was made at their house. Mr. Miller swears he made it that day, but does not state where. We think it was error to admit this paper. It was a mere private memorandum and at most could only have been used by Mr. Miller to refresh his recollection as to anything it contained which would be proper testimony, if anything.

Appellees were also permitted to prove, against the objections of appellant, a transaction between Evans & Lindsay and the bank, had at another and different time, which was also claimed to be a false and fraudulent misrepresentation of their standing, by which they procured the loan of money from the bank, which they had never paid back. This was clearly erroneous, for it in no manner tended to prove the charge of fraud in buying the goods, and had no connection with it whatever; nor were appellees in any manner induced to part with their goods by reason of the alleged fraud on the bank. The bank transaction occurred a year previous to the one involved in this suit. It was a mere attempt to prove a bad reputation for honest dealing against Lindsay & Evans, and to do it by proof of particular acts, which the law never allows. Other acts of fraud are competent to be shown when it appears they are a part of the general scheme under consideration, so as to form a part of it, but not otherwise. *Hanchett v. Riverdale Co.*, 15 Ill. App. 59.

Mr. Miller was permitted also, against the objections of appellant, to tell the jury what "ratings" Bradstreet and Dean gave Evans & Lindsay in their commercial reports. There was no proof that Evans & Lindsay ever authorized or knew anything about these "ratings." This evidence was also improper

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and should not have been allowed to go to the jury without proof that Evans & Lindsay authorized the statements.

The 13th and 15th instructions, also, given for appellee, are manifestly wrong. The 13th instruction informs the jury that one credible witness is worth more than many witnesses who, the jury may and do believe, have knowingly testified untruthfully upon any material point in issue and are not corroborated by other credible witnesses.

The 15th instruction informs the jury that if they believe from the evidence that the purchase of the goods was fraudulent or that judgments taken were not in good faith for money due, then the declarations of parties under oath on the witness-stand, who state such transactions were in good faith and without fraudulent intent, avail but little.

Neither of these instructions declare a correct proposition of law, and they both usurp the functions of the jury, whose duty alone it is to decide what weight shall be given to the testimony of witnesses. Several other instructions given for appellee, if not positively erroneous, are open to serious criticism, in being argumentative and suggestive, and singling out particular facts and making these prominent before the jury. The statute makes it the duty of the court to instruct upon the law only.

This record seems to be unusually pregnant with errors, so far as the mere conduct of the trial was concerned. The case seems to have been overloaded with instructions—twenty-eight in all—fifteen for appellee were all given, and thirteen for appellant, some of which were given and some refused. It would impose upon us too much labor and time and serve no useful end to go through the complaints made against these instructions in detail. It is perfectly certain that all the law properly applicable to the case could have been correctly written in very short space, and that had such course been adopted, the errors which in part swell the grand aggregate in this record, would hardly have suggested themselves to counsel.

The judgment is reversed and remanded.

Reversed and remanded.

36	238
138	515
36	238
55	134

GEORGE F. HARDING ET AL.

v.

HENRY S. DURAND.

Mortgages—Foreclosure—Limitations—Tax Title—Assignment—Evidence—Error and Appeal—Improper Parties—Practices.

1. Persons who, though not necessary or proper parties, are made plaintiffs in error without their knowledge or consent, will be dismissed from the suit at the costs of their co-plaintiff, and errors assigned on their behalf will be stricken out.

2. Plaintiff in error can not assign errors for his co-plaintiffs who have no interest in the suit; nor can he complain of errors that do not affect him.

3. Objections for want of parties can not be made for the first time on appeal.

4. The grantee of mortgaged premises, in the absence of his open declaration that he holds adversely to the mortgage, will be treated as holding subordinate to it, until it is barred by the statute of limitations.

5. The grantee of mortgaged premises can not acquire a title superior to the mortgage, by allowing the land to be sold for taxes and bidding it in.

6. The statute of limitations does not run against notes secured by a mortgage while the mortgagor resides out of the State.

7. Recognition of the debt by the mortgagor, and promise to pay, will take it out of the bar of the statute though the time of limitation has expired.

8. In a suit to foreclose mortgages, this court holds that complainant was the owner of the mortgages; that they were not barred by the statute of limitations; that an assignment claimed by defendant from one other than complainant was a nullity; and that defendant acquired no title in the land superior to the mortgage.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Winnebago County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. WM. J. AMMEN and GEORGE F. HARDING, for plaintiffs in error.

Mr. CHARLES A. WORKS, for defendant in error.

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C. B. SMITH, J. A preliminary question affecting the parties to this suit first requires our attention. A motion is made in this court by Mrs. Frank N. Davis and Mrs. Abbie N. Dennis, administratrix of her husband's estate, who are both made plaintiffs in error, to be dismissed out of this suit at the costs of their co-plaintiff, George F. Harding, and also to strike from the record all errors assigned for them or on behalf of the estates of their respective husbands. This motion is supported by the affidavits of both Mrs. Davis and Mrs. Dennis, disclaiming any desire to prosecute this suit and disclaiming any interest in the controversy or in the property which is the subject of litigation, and declaring that they were made parties plaintiff to this writ of error without their knowledge or consent. This motion was taken under advisement and reserved to the hearing of the case on its merits. In addition to the affidavits we have examined the record to ascertain whether Mrs. Davis and Mrs. Dennis, or either of them, were properly made plaintiffs. Upon examination of the record we fail to find that either of them or the estates of their respective husbands have any proper connection with this litigation such as to make either of them necessary parties to the suit. Both the estates have been long settled and the administrators discharged. We think, therefore, they were improperly made plaintiffs in this suit without their knowledge or consent and without having any interest in the subject-matter of the suit, and that they should be dismissed from the suit at the cost of their co-plaintiff, George F. Harding. It follows that the errors assigned on behalf of these two plaintiffs must also be stricken out. The allowance of this motion also eliminates the question of the competency of Henry S. Durand as a witness against George F. Harding, who claims to be prosecuting this writ of error in the dual capacity of administrator of Frank N. Davis, deceased, as well, also, as in his own right. The record discloses that he is no longer the rightful administrator of the estate of Frank N. Davis, and even if he was, the estate has no kind of interest in this suit for Harding to prosecute or defend. It is very clear from the record that this con-

troversy is one exclusively between George F. Harding in his own right and Henry S. Durand. Harding has no right to involve these estates in costly litigation against their protest and when they have no earthly interest in the suit, simply to enable him to obtain such an advantage over his real antagonist, Durand, as will prevent Durand from being a witness in his own behalf. Even if Mrs. Davis and Mrs. Dennis were retained in this suit it could serve Harding no useful purpose nor prevent Durand from being a witness, for the simple reason that neither of their estates have any interest in the land either to defend or prosecute.

It is also objected by the plaintiff in error that there was a want of proper parties below, in that the heirs of Frank N. Davis and of Spofford C. Field were not made parties defendant below. So far as this objection relates to the heirs of Field, it is sufficient to say that Field had sold all his interest in the land long before this proceeding was begun. Field and his wife sold the land to S. F. Cooper on the 28th day of May, 1860, five years after he executed the mortgages in controversy in this suit, by warranty deed. Of course this deed was subject to the mortgage, but it left no title in Field to leave to any of his heirs, and so they had no interest in the land. By various mesne conveyances, the title to the lands finally reached George F. Harding, appellant, and in the line of these conveyances was a tax deed to Purple, which also inured to the benefit of Harding by a conveyance, through Purple and others of his grantors, so far as it had any effect. The only title which Frank N. Davis appears to have ever had was by virtue of a contract from appellant Harding, agreeing to sell the land to Davis for a large sum of money and to make him a deed for the land, upon his paying the full amount of the purchase money. This was a mere contract to sell, agreeing to convey to Davis by deed, upon his fully complying with the conditions of the contract. The contract had a provision in it providing that in case Davis failed to make his payments promptly when due, then all his rights under the contract should be forfeited. Davis never paid for the land and Harding never made him any deed for it.

Davis made no defense and the bill was taken as confessed against him. He made no claim under his contract of purchase. His wife now disclaims any interest in the land. The execution of this contract of sale to Davis, upon condition that he pay for it, and that it should be forfeited if he failed, does not create such an interest in him as makes his heirs necessary parties, and especially, when the proof is that a deed was tendered and payment demanded of him and refused. There is neither any proof that Davis had any heirs except his wife, and she was made a party after the death of her husband, and she is not complaining. Appellant can not assign errors for his co-plaintiffs who had been dismissed out of this case, nor can he complain of any alleged errors which do not affect him or his title. *Martin v. Clark*, 116 Ill. 654; *Agnew v. Fults*, 119 Ill. 296; *National Bank v. King*, 110 Ill. 254.

This contract to sell, from Harding to Davis, was dated October 10, 1867, and without proof that it was complied with by Davis would not be sufficient to establish any such right in Davis as to make him or his heirs necessary parties to the suit after this long lapse of time, and especially after proof that he refused to comply with it. But there is another fatal objection to this claim, now set up for the first time, of a want of proper parties. It was not made below and it can not be made here for the first time. *Oliver v. Cochran*, 19 Ill. App. 236; *Farmers' Bank v. Sperling*, 113 Ill. 273.

Objections which can be removed (if well taken) on the trial, by amendment, must then be made. Parties can not be permitted to lie by and speculate on chances, and then when beaten, spring that class of objections for the first time in the Appellate Court. *Bowden v. Bowden*, 75 Ill. 111.

Having disposed of these preliminary questions, we come now to consider the case upon its merits.

This was a proceeding upon two bills in chancery to foreclose two mortgages, each securing a note in the sum of \$2,000, dated Beloit, Wisconsin, May 28, 1855, payable five years from February 10, 1855, to the Racine, Janesville & Mississippi R. R. Co., with ten per cent interest annually from

February 10, 1855. The notes were executed by Spofford C. Field, and the mortgages by him and his wife, Martha A. Field. The interest was paid on these notes, as appears by indorsement, until February 10, 1857. The bills were filed on the 16th day of August, 1878.

Spofford C. Field and his wife, George S. Harding and several other persons, including the railroad company (alleged to have some kind of interest in the land), were made parties defendant and summoned into court. Default was taken as against Field and his wife, and against the railroad company, Frank N. Davis and others, who have disclaimed or who have, in fact, no interest in the land. The railroad company to whom the notes were originally made, had sold them, and Spofford, the maker of the notes and mortgage, had sold and parted with all his interest in the land, as before stated, and at the time of the trial, was dead. William P. Dennis disclaimed any interest in the land.

No claim had ever been made by any of the many defendants to this suit, since its commencement, to the land described in the mortgages, except George F. Harding. He alone answered the bill and set up and relied upon a number of defenses below, and failing there, now appeals to this court and relies upon them here.

There is no controversy about the execution of the notes and mortgages; that is admitted. Appellant Harding denies in his answer, 1, that there was ever any interest paid on these notes; 2, denies that his title to the land is subordinated to the mortgages; 3, denies that complainant, Durand, is the owner or holder of the notes and mortgages, or that they were ever sold or assigned to him; 4, avers that Field and his wife were induced to execute the notes and mortgages by false and fraudulent representations, and that the notes and mortgages are fraudulent and void and not a lien on the land; 5, avers that he became the owner in fee of the land, by virtue of various mesne conveyances from Spofford and wife, and by virtue of a deed from the State (the tax deed) to himself, and that being so the owner in fee of the land he purchased and took an assignment to himself from the railroad

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company of these notes and mortgages for a valuable consideration, and that by operation of law the mortgages thereupon became merged in the fee. He avers that he took this assignment under the hand and seal of the president of the railroad company in good faith, and without any notice that the railroad company had, prior to such assignment to him, assigned and sold the notes to any other person; 6, alleges that he has been in possession of said land by himself, his vendors and tenants, by actual residence thereon, under a connected title deducible of record, ever since the year 1863, and paid all the taxes thereon, and has claimed the same adversely to all other persons during that period of time, and that said occupation and possession has been under claim and color of title acquired in good faith, derived by a series of conveyances from the State, and also from Spofford C. Field, beginning in the year 1862, by conveyance of warranty mortgage to J. S. Purple, and also through a series of agreements and conveyances, all of which became vested in respondent in 1864; 7, he pleaded and relied upon the statute of limitations of the States of Illinois and Wisconsin.

Durand filed replications, and on the 20th of May, 1879, the court ordered the two cases to be consolidated, and referred them to the master to take proof and report.

After the case had been in the hands of the master from May, 1879, to February, 1888, nearly nine years, the case was reported back to the court and the cause heard and decree rendered for complainants, foreclosing the two mortgages for the sum of \$16,396.66, and from that decree this writ of error is prosecuted and many errors assigned.

The record is quite voluminous, containing nearly 500 pages.

The complainant made out a *prima facie* case by introducing his notes and mortgages, and was entitled to a decree, unless the defendant established some of his defenses set up in his answer.

We have been favored by very exhaustive and elaborate arguments by the learned counsel engaged in the case. We shall consider the defenses made as nearly in the order above given as convenience will permit.

It is first denied that there were any payments of interest on the notes, but there is no proof to support this denial, and the payments of interest are indorsed on the back of the notes up to 1857. The third ground of defense is that Durand is not the owner of these notes and mortgages. We will consider this and the fifth ground of defense together. The fifth claim made by the defendant in his answer, is that he, himself, is the owner of the notes and mortgages, by purchase and assignment of and from the railroad company, to whom the notes were originally given. These two defenses both question Durand's possession and ownership of the notes.

Durand himself testifies that he bought these notes and mortgages of parties in the East, to whom they had been sold by the railroad company, in order to raise money to build its road. That he bought them in 1866 from a man named Cornell, as he thinks. He swears that since that time he has owned and had possession of these notes and mortgages, and that no part of them has ever been paid since 1858; that he applied several times to Spofford C. Field in the years 1875-6-7, for payment, and that Field often said he hoped soon to be able to pay them. He further testified that Field had lived outside of Illinois for about ten years since he bought the notes, sometimes in the Western Territories and sometimes California; that he had written Field frequently in California about the matter before seeing him finally in Chicago, and had made personal demand for payment; testifies that he, himself, had, as secretary of the railroad company, sold these and other securities to parties in the East to raise money to build the road, and that James H. Knowlton never had any authority to release these mortgages; says he bought and paid for the notes and mortgages. The mortgages were filed for record September 7, 1855.

Allen testifies that he talked with Field about the time the suits were begun about these notes, and that Field told him he was not in a condition to pay them then and regretted that they must be foreclosed, and said they had never been paid, and that they were given for a valuable consideration. He swears further that the railroad company sold these notes and mort-

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gages before maturity, and that the company had never paid them, and that the company retained no interest in them after it sold them.

Allen was a director in the railroad company when the notes and mortgages were given.

Dickson testifies that he has been secretary and treasurer of the railroad company, and that James H. Knowlton was president from 1865 until his death, three or four years ago, and that a search of the records of the company fails to disclose that Knowlton ever had any authority to release mortgages for the company, and, further, that the company has never owned any such mortgages as these in suit since he has been secretary, since 1865, to his knowledge.

This proof of ownership of the mortgages and notes on behalf of Durand is met by Harding by introducing a written contract, dated April 25, 1868, executed by the Racine and Mississippi Railroad Company, purporting to release the lands in the mortgages described to Geo. F. Harding, and also assigning and transferring the mortgages described in this suit to him. This paper was executed by James H. Knowlton, president of the company. A third mortgage was also introduced by appellant, which had been executed by Field and his wife to J. L. Purple long after the one in suit. Mrs. Martha Field, wife of Spofford Field, also swore that Hillman S. Cooper bought these same mortgages of the railroad company; that she saw him have them. She swears that she thinks Cooper kept them some time and then parted with them, but she can not tell how or where.

Plaintiff in error testifies that he was assured by the president and other officers of the road that they had never parted with these notes and mortgages, and that they repeatedly assured him that the above transfer was a good and valid release to him of these mortgages. As to what became of these two notes and mortgages after they were executed, and into how many hands they went first and last, it is very difficult to tell. There is a great deal of uncertainty and confusion in the evidence about it. But in this confusion and conflict of testimony, Durand is found in the possession of them, which

is strong presumptive evidence that he is the lawful and rightful owner. The evidence on that point for the defense is very inharmonious and unsatisfactory.

In this confusion and doubt, resulting largely, no doubt, from the long lapse of time, we can not say the court was not justified in finding that Durand was the owner of the notes and mortgages, and that all subsequent deeds and conveyances must be and were subject to the incumbrances of these mortgages. They were recorded shortly after they were made and long before Harding got any title. But aside from this he was fully advised of the existence of the mortgage when he bought the land from Purple and when he took his release from the railroad company. His second defense, therefore, falls with the third and fifth.

His fourth reliance in his answer is that the note and mortgage were obtained from Field and his wife through fraud.

There is not a particle of evidence to support this charge, but on the contrary it is clearly proven that Field got value received for his mortgages, and that they were valid and *bona fide* debts.

His claim that the mortgages merged in the fee in his hands, fails, because he fails to prove that he ever held the notes and mortgages.

Plaintiff in error claims title by possession under deeds of various kinds and in good faith, paying taxes under a title deducible of record since 1863, and that during all that time he has claimed adversely to all the world. Aside from the tax deed, this possession under various deeds for this long period would not avail as against a mortgage which had not been barred by the statute of limitations, because all such purchases and all such possessions must be subject to the lien of the mortgage so long as the right of action exists under it. The grantees of Field could hold no better position as against these mortgages than Field himself. In the absence of an open declaration on the part of the grantee of the mortgaged premises, that he holds hostile to the mortgage and repudiates any obligation under it, the law will treat him

Harding v. Durand.

as holding under and subordinate to it until the bar of the statute of limitations runs against it. It is his duty to keep the taxes paid and to protect the mortgage.

He can not let it be sold for tax and bid it in and thus get a title superior to the mortgage. The law treats all such purchases of the owner of the fee as simply a payment of the taxes. *Medly v. Elliott*, 62 Ill. 532.

Had, then, either the statute of limitations of Wisconsin or of Illinois run against these notes and mortgages? The statute of Wisconsin seems to have been six years, and in Illinois sixteen years. This depends upon whether Spofford C. Field remained a resident of either of these States during that length of time.

Both statutes have an exception or saving clause that stops the running of the statute during the absence from the State of the maker of the note and mortgage. We are satisfied from the proof in this case that after the execution of these notes and mortgages, Spofford C. Field was not in Wisconsin over three years continuously, and we think very much less than that, and that his stay in Illinois was not to exceed three or four years. He seems from the testimony of his wife and son, as well as other witnesses, to have been a wanderer, spending the larger part of his time in California and the Western Territories, while for a considerable part of this time his wife and son lived in Chicago; he was not with them and his home was not there. The statute kept these mortgages alive for the full period of sixteen years in this State and six years in Wisconsin, after he returned to the one State or the other, that being the limitation for promissory notes during that time in these two States. *Medly v. Elliott*, 62 Ill. 532; *Hagan v. Parsons*, 67 Ill. 170; *Blackburn University v. Weer*, 21 Ill. App. 29.

But, aside from the statute of limitations, the proof is that during the years of 1875-6-7, up to within a year before the commencement of this suit, Spofford C. Field, the maker of the mortgages, acknowledged the debt and showed a clear intention to pay it, and expressed the hope that he would soon have the means to pay it, and regretted the necessity of a

probable foreclosure. This recognition and promise to pay the debt would take it out of the statute of limitations, even if they had run the full time to bar the debt. *Wooters v. King*, 54 Ill. 343.

As to the tax title set up in the answer, even if the plaintiff could be permitted to avail himself of any such title accruing during the lifetime of the mortgage (which we hold he could not), still the proof fails to show any valid tax title which could be used for any purpose, except, perhaps, to show color of title in cases where that could be of any use.

Taking the evidence altogether, including Harding's contract of sale to Davis and his very peculiar assignment and release of the mortgage and notes from the railroad company, whereby he procured the release and assignment to himself of these large mortgages for one or two hundred dollars, indicates to our minds that he was willing to take the chances of a law-suit, if he got the claim of the railroad out of the way, and hardly establishes the averment in the answer of a purchase and holding in good faith.

No matter how much authority Knowlton had as the chief officer of the company to assign notes and release mortgages, it is perfectly clear that he could not release a mortgage nor assign a note which the company had sold to another. The assignment, taken by Harding on a separate piece of paper, of a note and mortgage in the hands of somebody else, assigned before maturity for a valuable consideration, could not affect the title of the real holder of the note and mortgage. Such an assignment as against a stranger, for value before maturity, was a mere nullity.

The importance of this case, involving, as it does, a large sum of money, and the zeal and earnestness with which it has been pressed upon our attention, has induced us to give the case a careful and patient examination, and after such examination we have been unable to find any error in the record. We think the evidence justified the finding of the Circuit Court and supports the decree, and the decree of the Circuit Court will therefore be affirmed.

Decree affirmed.

THE CALUMET IRON & STEEL COMPANY ET AL.

V.

WILLIAM LATHROP ET AL.

36	249
47	123
36	249
36	363

Deeds—Fixtures—Machinery.

Machinery placed in a factory by the owner of the land, and either actually or constructively attached to the building, which is operated by belt or gearing from the motive power of the plant, and is necessary for the prosecution of the business for which the factory was erected, are fixtures which pass with the realty.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Winnebago County; the
Hon. O. H. HORTON, Judge, presiding.

The N. C. Thompson Manufacturing Company, one of the defendants in error, was a corporation duly organized under the laws of this State, engaged in business at Rockford, Illinois, in the manufacture and sale of a general line of agricultural implements.

Its manufacturing property was located upon what is called the Rockford Water Power, and consisted of several lots upon which were erected several large stone shops and other structures used in the business, the principal buildings being connected by bridge or passage way from one to the other.

The motive power driving the machinery of the plant was, in the main, water, but to guard against want of sufficient power in low water, large steam boilers and powerful engines, fully equipped for use, had been placed in the buildings upon the premises and connected by means of wheels, belts and other gearing, with the main shafting through the buildings, for use when needful in driving the machinery, as well as to heat by steam through pipes, the factory buildings.

In conducting its business, which was quite extensive, it had placed and had in necessary use in the buildings above men-

tioned, many machines, much machinery and many implements useful and necessary for carrying on the business in which it was then engaged, which machines and machinery were either fastened to the buildings or were of weight sufficient to sustain the same in position without fastenings. Each machine being run by independent belt or gear from the main shaft. The entire machinery in controversy in this suit was all connected with the water and steam power of the manufactory, and propelled either by belt or gearing thereby.

The N. C. Thompson Manufacturing Company, on or about the 15th day of January, A. D. 1885, pursuant to a resolution of its board of directors, issued 100 bonds of the said company for the sum of \$1,000 each, concerning which no question is made in this case, of which bonds so issued, Singer, Nimick & Company (limited) held and owned forty-nine, thirty-five were held and owned by Whitman & Barnes Manufacturing Company, and sixteen by the Smith Bros. & Company.

To secure the payment of these bonds the Thompson Manufacturing Company executed and delivered its mortgage trust deed to one William Lathrop, as trustee of its manufacturing plant, property and effects, bearing date on the 15th of January, 1885. This deed was executed and delivered in pursuance of a resolution of its board of directors in due form, and was duly filed for record in the recorder's office of Winnebago county on the 16th of January, 1865, and duly recorded.

That mortgage trust deed contained this provision (following the description of the lands and water power): "And this conveyance does and shall include and embrace all the buildings and improvements erected and being upon the aforesaid lands, or any part thereof, and the buildings and improvements over the aforesaid race between the lots as above mentioned, and also does and shall include and embrace all the fixed and movable machinery in and about the buildings and every of them upon the aforesaid lots, and the tools and implements used and adapted to use in and upon said premises, in the prosecution of the manufacturing business

of said party of the first part. Hereby conveying and intending to convey to said party of the second part the manufacturing property, including machinery, tools and implements of said party of the first part, situate and being in said city of Rockford, and also including all such new or additional machinery and tools as the party of the first part may, from time to time, place in or upon its said manufacturing property."

On or about the 25th of December, 1886, the N. C. Thompson Manufacturing Company, being insolvent, executed and delivered to Samuel P. Crawford, as assignee, a general deed of assignment of all its property and assets for the benefit of its creditors, which deed of assignment was executed and delivered pursuant to the resolution of the board of directors of the company, and immediately upon the making of the assignment, the assignee, Crawford, took possession of all the property and effects so assigned and has so continued in the possession thereof, in the execution of his trust.

On the 18th of March, 1887, the plaintiff in error (the Calumet Iron and Steel Company) recovered two judgments in the County Court of Winnebago County, against the N. C. Thompson Manufacturing Company, aggregating about \$1,494, and at or about the same time the other plaintiffs in error, the De Golyer Bros., recovered two judgments in the said County Court against the N. C. Thompson Manufacturing Company, aggregating about \$1,776, which said judgments were by the Calumet Iron and Steel Company and the De Golyer Bros., presented to the said assignee, Crawford, as claims against the estate of N. C. Thompson Manufacturing Company, and these claims, after due proof thereof, were reported to and allowed by the County Court against the bankrupt estate, upon the application of the claimants.

On the 4th of April, 1887, the original bill in this suit was filed in the Circuit Court of Winnebago County, to foreclose the mortgage executed as before stated to William Lathrop, trustee, the bonds thereby secured, with interest thereon, having become due by the terms of the said mortgage, and then remaining unpaid.

To this original bill the De Golyer Bros., the Calumet Iron and Steel Works, as judgment creditors of the mortgagor company, and S. P. Crawford, as assignee of said company, were made defendants. By an amendment to the original bill by leave of court made, it was stated and charged that the machinery and tools referred to, and mentioned in the said mortgage deed, were in the buildings of the said N. C. Thompson Manufacturing Company at the time the mortgage deed was executed; that the same had been incorporated into and made part of the mortgaged premises; that the same were fitted for, and adapted to use in the business carried on and conducted in that industry, and remained in and were attached to the buildings and land in the mortgage deed described; that such machinery would be of little value, if removed, and the value of the mortgaged premises would be greatly lessened by removal, etc; to which amendment was attached a list of the machinery and tools then in and upon the said mortgaged premises.

To this bill the plaintiffs in error, as such judgment creditors, filed their answer, and also a cross-bill against the complainants in the foreclosure proceeding, and the assignee, claiming, in effect, that the manufacturing machinery in and upon the said mortgaged buildings and premises was personal property, and was not covered by the mortgage in the foreclosure proceeding, as against them as such judgment creditors, and that the assignment was void as to them, etc., and claimed the right to have satisfaction of their said judgments by a levy upon such machinery and sale thereof, under the executions issued upon their judgments, etc. Answers were filed to the original bill and the cross-bill and replication thereto.

It was agreed in the trial court between the parties, "that the machinery mentioned in the schedule of the assignee, marked 'machinery,' and mentioned in the amendment to the original bill, was the same machinery in use by the N. C. Thompson Manufacturing Company in its factories on the mortgaged premises at the date of the mortgage herein sought to be foreclosed; that said machinery was placed in the factories, mort-

gaged by the then owners of the property, and was adapted to use in the business then being prosecuted by said mortgagor corporation, at the date of the said mortgage, and was necessary for the convenient prosecution of such business, and that the said machinery at the time of such hearing remained in the said mortgaged factory buildings."

A reference was had to the master in chancery to report proofs and findings, who reported the evidence taken, and found "that the machinery in the factory mentioned in the amended bill was conveyed by the terms of the mortgage deed, and are now subject to the lien thereof," etc., to which findings plaintiffs in error excepted, the exceptions were overruled, and exceptions were taken to such ruling.

The court below on hearing decreed the foreclosure of the mortgage on the original bill as prayed, and the sale of the premises therein described with the machinery in said mortgage stated and described, to be sold to satisfy the said decree in case of non-payment, etc., and denied to plaintiffs in error the relief sought for and prayed in their cross-bill and dismissed the same.

To reverse which decree in refusing the relief sought by the cross-bill and dismissing the same, and in overruling the exceptions to the master's report of facts and findings, this writ of error is prosecuted.

Mr. D. M. KIRTON, for plaintiffs in error.

Messrs. ALFRED TAGGART and W. & E. P. LATHROP, for defendants in error.

UPTON, P. J. This was a bill in equity commenced in the Circuit Court of Winnebago County by the defendants in error as mortgagees and bondholders of the N. C. Thompson Manufacturing Company, a corporation duly organized under the law of this State, to foreclose a trust deed executed by that company to William Lathrop as trustee, dated January 15, 1885, and duly recorded, given to secure the payment of \$100,000 and interest at six per cent, which amount was evidenced by one hundred bonds of that company of

\$1,000 each, which were held and owned at the commencement of this suit and rendition of the decree therein by Singer, Nimick & Company (limited), Whitman & Barnes Manufacturing Company, and Smith Bros. & Company, who, with William Lathrop, trustee, were complainants in the original bill for foreclosure. The bonds having prior thereto become due and payable by the terms of the deed of trust.

The deed of trust especially provided that the lien thereof should extend to, include and embrace all the fixed and movable machinery in and about the buildings in the trust deed described, standing upon the lots therein designated, together with the tools and implements used and adapted to use in and upon the premises in said deed designated, in the prosecution of the manufacturing business of the N. C. Thompson Manufacturing Company, as is above fully set forth and stated.

The plaintiffs in error were judgment creditors of the N. C. Thompson Manufacturing Company. Their several judgments were obtained subsequent to the execution, delivery and record of the deed of trust sought to be foreclosed, viz., on March 14, 1887. As such judgment creditors, they were made parties defendant to complainant's bill for foreclosure; answered the same, and filed their cross-bill thereto, by which they sought to establish that the machinery was personal property, and subject to execution on their judgments; complainants answered the cross-bill and upon replications being filed, the cause was referred to the master to report proofs and findings, etc. The master, after hearing, made and filed his report, in which he found for the complainants in the original bill, that the machinery mentioned therein was in use in the factory of the mortgagor company at the date of the deed of trust, placed therein by the owner thereof, adapted to use in the business then being prosecuted by the mortgagor company, and was necessary for the convenient prosecution of its business; that the same then remained in such factory buildings, and that such machinery was conveyed by the terms of the deed of trust, and was subject to the lien thereof, and that complainants in original bill were

entitled to a decree foreclosing the said trust deed mortgage for the payment of the bonds secured thereby. Exceptions were filed to the master's report, which, being overruled, a decree was entered for the complainants in the original bill foreclosing the said mortgage deed of trust for the amount due them, and dismissing the cross-bill of plaintiffs in error, and denying the relief thereby sought.

The record before us presents two questions :

1st. Whether the machinery in controversy, under the facts, was so actually or constructively annexed or attached to the realty as to pass by the conveyance or mortgage of the land upon which it was situated, where the intent of the parties to such deed or mortgage to so treat it is manifest.

2d. Whether the deed of assignment to S. P. Crawford by the N. C. Thompson Manufacturing Company was effective or void.

First. That the machinery in question was placed in the buildings upon its plant by the Thompson Manufacturing Company, its owners, prior to the execution of the mortgage, and was, in fact, the operative machinery in the business of the mortgagors, and was all, either actually or constructively, attached or annexed to the factory buildings of the plant and was operated or propelled by belt or gear from the motive power of that plant, and was adapted to and necessary for the successful and proper prosecution of its business, we think, will not be controverted in this case. The rule determining what are to be regarded as fixtures, so often stated and sought to be applied is :

"1st. Real or constructive annexation of the thing in question to the realty."

"2d. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected."

"3d. The intention of the party making the annexation to make it a permanent accession to the freehold. This intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made." *Ewell on Fixtures*, pages 21 and 22.

This author adds:

"Of these tests the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention." *Chapman v. U. M. L. Ins. Co.*, 4 Ill. App. 29. The intent of the owners to make this machinery a permanent accession to the freehold, as a question of fact seems both from the evidence and stipulation of the parties to be fully established.

It is in the power of the owner of the inheritance to affix any article of property to it he pleases, and where he does so it becomes a fixture in the general sense of that term and part of the freehold, and if the inheritance be afterward sold or mortgaged or rented, the fixtures go with the freehold. * * * And it makes no difference to what purposes the realty is applied or used, whether for trade, manufactures or agriculture. As between landlord and tenant it might be different. Annexations, when made by the owner, must be presumed to be made with the design of their permanent enjoyment in connection with the realty and as accessory to it. *Arnold v. Crowder*, 81 Ill. 56; *Smith v. Moore*, 26 Ill. 392; *Chapman v. U. M. L. Ins. Co.*, 4 Ill. App. 29, *supra*, and cases therein cited.

The general rule undoubtedly is, that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance or mortgage of the freehold, where there is nothing to indicate a contrary intention. Nor is it necessary, in all cases, that things should be actually affixed to the freehold in order to constitute a part of it, for the purpose of transfer or sale, as in the case of millstones which are constantly being taken up and sharpened. When up they are as much a part of the mill as when in their beds, and yet would pass by deed or mortgage of the mill even if they had been detached for months. So in various kinds of machinery, such as a screw or cutting engine or lathe, when a great multitude of different size pinions or cutters are kept on hand or used, only one of which could be used at a time. All are nec-

essary to complete the machine, and would pass by a sale of the factory, as being a part of it; so the sale of a foundry, as such, would convey the flasks and molds within it. So the machinery for hoisting coal, such as steam engine, machinery and fixtures, including boxes and all other necessary appliances connected therewith, are regarded as realty. Ewell on Fixtures, pages 275, 290, 307, 312; Palmer v. Forbes, 23 Ill. 237; Dobschuetz v. Holliday, 82 Ill. 371; Hunt v. Bullock, 23 Ill. 320; Titus et al. v. Mabee, 25 Ill. 257; Jones on Mortgages, Sec. 446; Jenny v. Jackson, 6 Ill. App. 32; Thielman et al. v. Carr et al., 75 Ill. 392; Arnold v. Crowder, 81 Ill. 56; Wood v. Whelen, 93 Ill. 155; McLaughlin v. Johnson, 46 Ill. 163; Chapman v. U. M. L. Ins. Co., 4 Ill. App. *supra*; Otis v. May, decided at May term, Appellate Court, 2d division, 1889, affirmed by the Supreme Court, October term, 1889, filed at Ottawa.

The Massachusetts rule is in full accord with the cases determined in this State cited above.

It was held in Winslow et al. v. Merchants Ins. Co., 4 Met. (Mass.) 306, which was a mortgage of a machine shop and the contest was between mortgagees, the point was what of the machinery the first mortgagee took under his mortgage, which made no mention of machinery, and in point of fact the machinery was nearly all placed in the mortgaged building after the making of the first mortgage. Chief Justice Shaw says: "The court are of the opinion that the steam engine and boilers and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands or other gearing, as between mortgagor and mortgagee, are fixtures, or in the nature of fixtures, and constitute a part of the realty; and that as all these fixtures were annexed to and made a part of the realty by the mortgagor, they are a part of the mortgaged premises, and passed by this first mortgage to the defendants."

In Pierce et al. v. George, 108 Mass. 73, where the owners of a factory for the manufacture of heels, toe plates, etc., also owned certain machinery in their factory used in their business, and on the 15th of March, 1867, when but a small portion of the machinery of the factory had been put in place,

the owner of the property executed a chattel mortgage on the machinery, which was duly recorded about one month thereafter, and after all machinery had been placed in the factory the owners made a real estate mortgage upon the factory and land upon which it stood, the contention was as to the rights of the mortgagees under the chattel and real mortgages. The machinery was held to belong to the real estate mortgage. In determining that case the court say: "Articles placed in a mill by the owner to carry out the obvious purpose for which it was erected, and adapted to that purpose, are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere." "In a building erected as a factory, the steam works relied upon to furnish the motive power and the works to be driven by it, are essential parts of the factory adapted to be used in it, and with it, and would pass with it by a conveyance of the real estate."

The same doctrine is held in Maine. *Parsons v. Copeland*, 38 Maine R. 537; *Farras v. Stackpole*, 6 Greenleaf, 154; *Frall v. Fuller*, 28 Maine, 545; *Corlis v. McNaign*, 29 Maine, 115.

In Iowa the same rule is adhered to in *Ottumwa Woolen Mill Co. v. Hawley et al.*, 44 Iowa, page 57, which was a trust deed in the nature of a mortgage upon a lot in the city of Ottumwa, upon which was situate a woolen manufactory. The trust deed described the lot "*with all the tenements, hereditaments and appurtenances thereto belonging.*" The factory contained machinery for manufacturing wool into cloth, its motive power a steam engine. It was conceded that the engine, boiler, whistle, pump, and attachments and belts connecting directly with the other machinery were real estate, but the question presented was whether the "wool carders, condensers, breakers, spinny jacks, looms, shears, etc.," were fixtures and passed under the trust deed. Some of the machines in the factory were fastened to the floors by bolts and screws, others kept in place by their own weight. The machinery in part operated by steam was driven by belts from the main shaft, or counter-shafting; after a searching review of the authorities, the court say: "Our conclusion is that all of the machinery which was propelled by the engine, was part of the real estate, and passed under the trust deed," etc.

In Wisconsin the same rule is held in *Taylor v. Collins*, 51 Wis. 123, which was a suit to foreclose a contract for the sale of land where the defaulting purchaser had put up a factory for the manufacture of spring beds. Many of the articles, tools and machinery in the factory were claimed as fixtures, not removable by the defaulting purchaser; among other things that court said: "The operating machinery consisted of a circular saw and frame, a jig saw and frame, with the different saws belonging thereto, a mortise machine, a planer, borer and header, and a turning lathe, secured to the building in the usual manner, run and operated by steam power. It was the intent of the owner in building the shops, putting in steam works and machinery, to make them permanent accessions and annexations to the freehold, and of permanent benefit and addition to the value of the land, and as an improvement of his own property for the purpose of establishing and conducting a manufacturing business. All of the machinery was adapted to the use to which it was put, and actually applied thereto," etc., and it was held that the whole of the machinery and attachments were fixtures.

So in Michigan, in *Toyle et al. v. Palmer Trustees*, 42 Mich. 314, which was a case where the owners of a woolen mill and the land on which it stood had mortgaged the entire plant and included the machinery. The trial judge and the court sitting *in banc* said that the parties to the mortgage believed the machinery to be personal estate. The mortgage was foreclosed in equity and decree for sale was obtained. Before the sale the mortgagor became bankrupt, and the assignee in bankruptcy claimed the machinery as personal property. The trial court held it to be personal property. Upon appeal the Supreme Court held it was real estate, and passed by the mortgage. That court said: "The circuit judge finds the machinery personalty. This finding was no doubt based upon the fact that the parties so believed and considered it. This may generally be conclusive, but not always, and in this case it is clear the parties were mistaken. The machinery was especially adapted to use in connection with the real estate. It was put up for use

and actually used with it, and was not severed from the realty in ownership. The fact that it was described in the mortgage specially was unimportant."

In Maryland the same rule was followed in *Dudley v. Hurst*, 67 Maryland, 44; in this case the owner of a large tract of land, used as a farm, had established thereon a factory for canning of fruits, corn, etc. The owner mortgaged the farm, buildings, improvements, appurtenances, etc. About two years after, the farm was sold on the mortgage to Dudley, who took possession and occupied during the year. About one month preceding the sale on the mortgage to Dudley the mortgagor executed a chattel mortgage on the machinery in the canning factory to Hurst. Some months after, Hurst attempted to sell the machinery under the chattel mortgage; Dudley restrained the sale by injunction, and in his bill therefor claimed that the machinery and canning fixtures passed to him as purchaser, under the sale on the real estate mortgage. The court said: "We are therefore of the opinion that the whole machinery of the canning factory passed under the mortgage to (the trustee) Bowie, and consequently to his vendee, under the mortgage sale."

In New York the same rule is held in *McRae v. Cent. Nat. Bk. Troy*, 66 N. Y. 489, and in *Potter v. Cromwell*, 40 N. Y. 287, and both cases discredit, if not directly overrule, the case of *Murdock v. Gifford*, 18 N. Y. 28, at least between mortgagor and mortgagee.

The Supreme Court of the United States held the same rule in *Hill v. National Bank*, 97 U. S. 450. "That as between mortgagor and mortgagee the lands, buildings, waterpower and necessary machinery of a paper mill were a unit, and should be so treated and regarded in a foreclosure of a mortgage upon the realty."

Such, also, is the English rule, as will be seen in *Bowie on Fixtures*, pages 114 to 125. This rule, so well established and so firmly supported by reason and the highest judicial authority in this State and elsewhere, we can not disregard, and would not if we could.

We have carefully examined and duly considered the cases

Matzenbaugh v. Troup.

cited by the learned counsel for the plaintiff in error, and we do not think these cases support the view contended for by him. And while it is true some conflict may, and doubtless does, exist upon the question under consideration, we can not but think such conflict arises more in the application of the rule to the particular circumstances and condition of the cases in which it has been invoked, rather than in the necessity, justice or propriety of the rule itself.

We hold, therefore, that the machinery in question was a part of the real estate and passed to the trustee under the trust deed, and was subject to sale under the foreclosure proceedings, in satisfaction of the indebtedness which it was given to secure.

Second. We are not called upon, in the view we have taken of this case, to determine the validity of the assignment to S. P. Crawford, and while we are inclined to think it good, yet in this case the mortgage or trust deed being effectual to warrant the decree in the court below, it is not material for us to determine as to the validity of the assignment, and we refrain from so doing.

We have examined the record before us with the care its merits demand, and we can not say that the trial court was not fully justified, both upon the law and the facts, in the decree rendered in this case, and that decree is therefore affirmed.

Decree affirmed.

JOSIAH MATZENBAUGH ET AL.

V.

CHARLES TROUP ET AL.

Usury—Mortgages—Foreclosure—Attorney's Fees—Agency—Pleading—Evidence.

1. In a foreclosure suit this court holds that the evidence warranted a finding of usury.

2. A provision in a mortgage for payment of an attorney's fee in case of foreclosure is not usurious.

3. The makers of a note secured by mortgage, who have conveyed the mortgaged premises, may plead usury in a suit to foreclose.

4. A usurious note is binding as to all except the interest, and the mortgage securing it as to all its provisions, except the interest reserved in the note.

5. Where the agent who makes a usurious loan is a general agent, his principal is held to notice of the usury.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Iroquois County; the
HON. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EUANS, for plaintiffs in error.

Mr. ROBERT DOYLE, for defendants in error.

LACEY, J. This was a bill in equity to foreclose a trust deed executed by Charles and Ella Troup, his wife, on certain real estate, to Charles J. Matzenbaugh, to secure a promissory note for \$1,500, dated March 3, 1883, due in twelve months, drawing eight per cent interest from date, and signed by said Charles, and Mary Troup, there having been default, as the bill alleges, in the payment of the note. The bill also shows that before the commencement of the suit the complainant and trustee purchased of his co-complainant, C. J. Matzenbaugh, and fully paid her for the said note and mortgage and that the same then belonged to him; that the trust deed provided that in case of default of payment of the note and interest, etc., as they should become due, it should be lawful for said trustee to file a bill in equity against such grantor to obtain a decree for the sale of said premises under an order of court, and of the proceeds pay, first, the costs of such suit, of advertising and conveyance, and \$75 attorney's fees and solicitor's fees, and all other expenses of the said trust, etc., and then the amount due on the note and interest; that said Charles and Ella Troup, for the pretended consideration of \$1, July 6, 1886, conveyed the said real estate to Alfred Troup; that on July 7, 1886, said Alfred and

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wife conveyed, for a consideration of \$1, the same premises to Ella Troup, which deeds were duly recorded; that there were several judgment creditors of the said Charles Troup who were made parties to the bill. The respondents, Charles, Ella and Mary Troup, filed their joint and several answers to the bill admitting the execution of the note, but averring that there was usury reserved by the said complainants to the amount of \$30, and that said Charles Troup only received from complainant, Josiah Matzenbaugh, who transacted the business, and was, in fact the lender of the money, the sum of \$1,470, and that the note was drawn in the form named for the purposes of evading the usury laws; that it was agreed the money was to draw ten per cent interest per annum, and that Mary Troup, his mother, who was security on the note, received nothing. They admit the covenants in the trust deed as charged; the answer further admits that said Charles paid \$120 averred in the bill, less the \$30 afterward to be paid, and charges that it was for one year's interest; admits the conveyances and the purpose of them was to get the title in said Ella. Charles claims that he is ready to account on the basis of \$1,470, less the payment of \$120, and other payments and other credits claimed. The court below found that the transaction was usurious, as charged in the answer, and after finding various credits, deducted them from the principal sum loaned, \$1,470, and gave a decree of foreclosure for the balance, amounting to \$699.26, and ordered the sale of the mortgaged premises, and refusing to allow the \$75 attorney's fees claimed in the bill as part of the costs of foreclosure. This writ of error is sued out of this court by the plaintiffs in error, seeking to reverse the decree, and assigning for error the action of the court below in finding usury to have existed in the making of the loan as charged, and in refusing to allow plaintiffs in error interest, and in refusing to allow him the \$75 as attorney's fees, to be taxed as costs in the foreclosure suit.

After a full consideration of all the evidence, we feel satisfied that the decision of the court below was correct as to the finding of the usury charged in the answer to the bill. In

our opinion the evidence sufficiently shows that the plaintiff in error, Josiah Matzenbaugh, who claimed to act in the transaction in loaning the money as the agent of Caroline G. Matzenbaugh was, in reality, the principal and not the agent, and procured the note to be drawn payable to her as a cover to enable him to evade the usury laws, and secondly, if in any event he could be regarded in reality as her agent, he was a general agent, and she therefore should, under the law, be held to notice of the usurious transaction. *Stevens v. Meers*, 11 Ill. App. 138; *Rogers v. Buckingham*, 33 Conn. 86; *Payne v. Newcom*, 100 Ill. 20. We are of opinion also, that complainants, being the makers of the note, have the right, under the law, to plead usury. *Stiger et al. v. Bent*, 111 Ill. 336; *Stevens v. Meers*, 65 Am. 766. If this were the only question involved in the case we should feel constrained to affirm the decree of the court below; but the action of the court below in refusing to allow the attorney's fees provided for in the mortgage as costs, we deem erroneous. As we understand from the record and arguments of counsel in the case the court below rejected the item of the attorney's fees for the supposed reason that it was a part of the usurious transaction, and a part of the money reserved as interest or damages in excess of the interest allowed by the statute. We think it quite clear from the nature of the transaction that the attorney's fee provided for in the mortgage was no part of the interest agreed to be reserved for the use of the money loaned. It was intended merely to reimburse plaintiffs in error against costs in case foreclosure had to be resorted to as a means to enforce collection. This question seems to have been fully settled by the Supreme Court in the case of *Barton v. The Farmer's National Bank*, 122 Ill. 352.

It was there held that where a note was given, in which it was provided that if the note was not paid when due the makers agreed to pay to the payee an attorney's fee of \$30, if placed in the hands of an attorney for collection, it was not obnoxious to the statute of usury.

The principle was there announced that in case the instrument provides for no new or additional compensation or interest for the use of the money, because of the failure to

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pay at maturity, or in the nature of such additional interest, but a provision merely against loss or damage to the payee, specifically pointed out, and which will necessarily result if the debtor fails to fulfill his undertaking, the case would not be one of usury. The case supposed is one where the payee of the note is compelled to pay out money for the collection of the sum named in the note or instrument, on account of the default of the maker, and which provides for reimbursing the payee for money he will be wrongfully compelled to pay by the other's default.

It is not a profit resulting to the payee; it is intended merely to keep him whole against loss and the payment of charges. If such an agreement were inserted as a mere device to cover usury, it would be usurious, the same as though the case fell directly within the provisions of the statute; but there is no such proof here. Sec. 6, Chap. 74, now provides "That all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate of interest than herein specified, on account of non-payment at maturity, shall be usurious."

It will be remembered that prior to the passage of the above statute, notes and agreements whereby damages were agreed to be paid in addition to the legal rate of interest on account of the non-payment of the principal at maturity, were held by the courts of this State not to be usurious *per se*, but only so in case the evidence showed the form was used as a mere device to evade the statute. The agreement if *bona fide* would be enforced. The Legislature, seeing the great liability of abuse if such form might be used, and the great difficulty there was in many instances to prove that such contracts were not as they purported to be, but a device to cover usury, which experience showed they were nine cases out of ten, passed the above statute, and thereby provided that all such agreements should be held to be conclusively usurious. But in doing so the Legislature did not intend to extend the enactment to cover cases not within the terms of the statute, as is contended for by counsel for appellee, and so held by the Supreme Court in the case above cited. In the case at bar the note itself does not provide for the payment of the

attorney's fee—the provision is in the mortgage. The mortgage itself is valid. The fact of there being usury in the note only affects the accounting. *Snyder v. Griswold*, 37 Ill. 216; *Union Nat'l Bank et al. v. Int. Bank et al.*, 123 Ill. 510.

After the forfeiture of the payment of the principal, which it is not contended was not due and payable, foreclosure became necessary under the provisions of the mortgage, and the attorney's fee should have been allowed. In *Wilday et al. v. Morrison*, 66 Ill. 535, and *Armour v. Moore*, 5 Ill. App. 433, it was said that the entire contract was void because of the fact of there being usury in the transaction, and that only under the rules of equity could even the principal sum loaned be recovered. But we think as applied to the case at bar these expressions would be too broad. If such were strictly held, the note and mortgage would be entirely void and no foreclosure could be had, and even the note as evidence of debt would be void, which would allow the five year statute of limitations, applicable to verbal contracts, to be pleaded against it. It was not necessary to the decisions of the cases for the court to make these observations, and such rule applied to the case at bar could not be allowed consistently with the other decisions of the Supreme Court. Only the interest provided for is forfeited and the contract in other respects is good, as is held in *Union Nat'l Bank et al. v. Int. Bank et al.*, 123 Ill., *supra*.

The note is in force in this case as to all except the interest proper, and the mortgage as to all its provisions except as to the interest reserved in the note and accounted to be usurious. The defendants in error could have avoided all payment of all costs of foreclosure, including the attorney's fee, by paying or tendering the principal sum due at the time the note and mortgage so provided. In default of this, defendants in error will be obliged to pay all costs of foreclosure, including the attorney's fee provided for in the mortgage.

The decree of the court below is therefore reversed and the cause remanded to that court, with the instruction to allow the attorney's fees in accordance with the provisions of the mortgage, but deduct all interest as it did before on account of usury.

Reversed and remanded with directions.

Ebersole v. First Nat. Bank of Morrison.

SMITH, J. I concur with a majority of the court in all respects except as to the attorney's fees. I think the Circuit Court properly refused to allow that part of complainant's demands. This case differs from *Barton v. The Bank*, 122 Ill. 352; there it was attempted to be shown that the attorneys for usurer caused the usury, but the court held otherwise. Here the usury exists outside of and independent of the attorney's fees claimed, and this bill is an attempt to enforce an unlawful and illegal demand in so far as it is usurious.

I do not think attorney's fees can be collected by a party who is attempting to enforce an illegal demand either in whole or in part. 66 Ill. 535; 89 Ill. 125; 106 Ill. 99; 5 Ill. App. 433.

BENJAMIN F. EBERSOLE

v.

THE FIRST NATIONAL BANK OF MORRISON.

Negotiable Instruments—Note—Assignment—Gambling Contracts—Practice.

1. Where, in an action on a note, the declaration alleges that plaintiff is the assignee thereof before maturity, for value, special pleas which set out facts which would constitute a valid defense to the note in the hands of the original payee, but do not aver that plaintiff had notice of the facts or purchased the note after maturity, or that he was not the *bona fide* holder thereof, are demurrable.

2. In this case it is *held*: That the contract for the purchase of Bohemian oats, for which the note in suit was given, is not, *per se*, a gambling contract, and defendant's plea, not alleging that the contract was intended by the parties thereto as a bet or wager, is demurrable.

3. A demurrer does not admit inferences from the facts pleaded, nor matters of law deduced therefrom by the pleader.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Whiteside County; the
HON. JOHN D. CRABTREE, Judge, presiding.

Messrs. MANAHAN & WARD, for appellant.

Messrs. JAMES D. ANDREWS and WILLIAM BARGE, for appellee.

UPTON, P. J. This was an action brought in the court below to recover the amount due upon a promissory note assigned to the appellee (by indorsement by the payee thereof), given by the appellant and made payable to C. W. Spear in the sum of \$500, due on or before the first day of January, 1887, with interest at six per cent, payable annually, to commence January 1, 1886.

The declaration was in the usual form, counting on said note as indorsee or assignee thereof, before maturity, for consideration, etc.

To this declaration appellant interposed four special pleas; the general issue was not pleaded.

The appellee demurred to each and all of the special pleas, and it was sustained by the trial court. The appellant abiding his pleas, the court gave judgment on the note against appellant, and from that judgment appeal is taken to this court and its correctness is here questioned.

We are of the opinion that the demurrer was well taken to all the special pleas, and that the trial court properly so held.

In most, if not all, of these special pleas, is set out in various forms alleged facts which, if established, would have constituted a valid defense to the note sued on in the hands of the original payee; but in neither of these pleas is it averred that the appellee, the assignee of the note, purchased the note with notice or knowledge of such alleged facts, or that it purchased the note after its maturity or without full value therefor paid, or that it, the assignee, was not, at the time after the assignment thereof or suit brought, the *bona fide* or innocent holder thereof.

Sec. 9, of Chap. 98, R. S. (Starr & C. Ill. Stats.), declares that neither the want nor failure of consideration shall be any defense to a note, bond, etc., in the hands of an innocent, *bona fide* assignee or holder thereof, when such assignment was made before such note, bond, etc., became due.

Section 10 of the same chapter provides, as an exception to

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Sec. 9, that in case any fraud or circumvention be used in obtaining the making or the execution of any instrument mentioned in Sec. 9, such fraud or circumvention, etc., may be set up to defeat the note, bond, etc., in the hands of the original holder or any assignee thereof; which last recited provision has been construed to mean some fraud, trick or device in the making or execution of the instrument which induces the giving of one character of instrument under the belief that it is another of a different character—such as the giving of a note or other agreement for one sum or thing, when it in fact is for another sum or thing, or as the giving of a note under the belief that it is a receipt, etc. But it is not such fraud as relates to the quality, quantity, value or character of the *consideration* which moves the contract, nor as to fraud in obtaining the note, which goes only to *impeach the consideration*.

Sec. 179 of Chap. 38 (Starr & C. Ill. Stats.) provides that "All promises, notes, bills, bonds, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatever, when the whole or any part of the consideration thereof shall be for any money, property or other valuable thing *won* by any gaming or playing at cards, dice or any other game or games, or by *betting on the side or hands of any person gaming*, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election, *or unknown or contingent event whatever*, or for the reimbursing or paying of any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming or betting, or that shall during such play or betting so play or bet, shall be void and of no effect;" and section 17 of the same chapter, relating to gambling contracts in grain, all of which are declared void.

Other than these exceptions under our statute applicable to the case at bar, so far as we are at present advised, an innocent holder of commercial paper, like the promissory note in the case before us, indorsed to a *bona fide* holder or assignee before maturity, without notice of defects, etc., is protected;

and no other defense can be interposed by the maker to defeat it.

The appellant, who is the maker of the note in suit, in his first plea attempts to set up a defense to the note under Sec. 179 of the statute above recited, as we apprehend it, but, as we think, wholly fails in several special particulars. The plea sets out a certain contract alleged to have been made between appellant and one C. W. Spear, the payee of the note, jointly with one Fox, in connection with the Ohio, Indiana and Michigan Oat Association, which contract the pleader, as a legal conclusion, calls a *bet*, but which is, as we interpret it, not necessarily a *bet*.

The agreement which is set out in the plea and called a *bet*, stripped of the allegations characterizing the transaction, and the inferences and assumptions as to matters of law by the pleader, taken in connection with the note in suit, which is a promise to pay to the payee, jointly with other parties named therein, was this: In consideration that the appellant would then and there purchase of the payee (Spear), fifty bushels of Bohemian oats, at \$10 per bushel, and then of that value, and for which the note was given, to sell for the appellant 100 bushels of the like description of oats at the same price per bushel, on or before December 6, 1886, and if not done, the note sued on was to be regarded as paid.

This contract on its face is not a gambling contract, *per se*, nor within the inhibition, intent or meaning of the statute above cited and referred to, necessarily.

The undertaking was legitimate and lawful, if *bona fide*, and the parties thereto had the right to fix the damages for its breach, by agreement to liquidate at \$500, or the cancellation of the note.

This being true, and as all intendments are to be taken most strongly against the pleader, the appellant should have averred in his plea, in substance, that the intention of both parties to this contract was that the contract was not to be carried out or performed, but that it was put in that form simply as a cover to cloak a gaming, or gambling transaction, or that it was intended by the several parties thereto as a *bet* or

wager. We feel compelled to say that the plea appears to us to have been artfully drawn, with intent, and for the purpose of obtaining a judicial construction by the court; that the contract, both in law and fact, in the form in which it was alleged, was in itself (*per se*) a bet, and thereby relieved the pleader from making further proof than the production of the contract in evidence.

We do not think the legal inferences to be drawn from the contract set up in the plea, without averments of intention, are in an issuable form, and the demurrer did not admit them, as contended by appellant.

A demurrer to a declaration admits all the facts well pleaded to be true, but not the inferences from them. *Arms v. Wier*, 89 Ill. 25.

Nor does a demurrer admit matters of law deduced by the pleader from allegations of fact in the plea stated. *Gould's Pleadings*, Chap. 9, Sec. 29; *Millard v. Baldwin*, 3 Gray (Mass.), 484.

The matters alleged in the plea must be traversable or issuable. *Stephen's Pleadings*, 217 (star page).

A demurrer does not confess the character of a contract to be that by which it is designated in the plea. The case of *Kellogg v. Sackin*, 3 Pinney, Wis., is in many particulars similar to the case at bar and serves to illustrate the principle under consideration. In that case the pleas expressly alleged that the association (plaintiff), its alleged plans, schemes, etc., tended to the manifest injury and restraint of trade, and because the truth of that averment was claimed to have been admitted by the demurrer and because contracts in restraint of trade are held void, therefore, the judgment should have been for the defendant. The court say: "The answer is manifest, if the agreed plans and schemes alleged to have been of such pernicious tendency, or any other than what appears on the face of the contract as alleged, then they are not well pleaded, because the plea should set forth the schemes, etc., in terms, not describing their symptoms or effects, but by stating their nature and essence, leaving the court to determine of the legal effect."

We are of the opinion that the trial court did not err in holding the first plea obnoxious to the demurrer.

As to the second, third and fourth pleas the law is too well settled, in our judgment, to require citations of authorities or further discussion. Neither of these last named pleas, set up any defense to the note sued on in the hands of an innocent holder for value before due, as provided by statute.

Neither one of the pleas show that the note was given in consideration of a wager or for a *bet*, or for gaming in grain, or that its execution was obtained by fraud or circumvention, within the true intent and meaning of the statute in such case made and provided. In our judgment, therefore, the court below did not err in sustaining the demurrer to the appellant's several pleas filed herein, and as the appellant did not ask to plead over, but chose to abide by his plea as pleaded, the court below did not err in giving judgment for the appellee on the note, and that judgment is affirmed.

Judgment affirmed.

SMITH, J. I think the first special plea was good.

ANDREW DILLMAN

V.

THE WILL COUNTY NATIONAL BANK ET AL.

Homestead—Assignment—Practice.

1. The oath administered to householders summoned as commissioners by a master in chancery, under a decree of court enforcing a lien, to appraise and set off a homestead, may be administered by a notary public.

2. The fact that the summons to the commissioners, and other papers in the proceedings before them and the master, were written, except the signatures, by the solicitor for the party whose lien was enforced, does not invalidate the assignment of homestead, or the sale.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Will County; the Hon. DOBBANCE DIBELL, Judge, presiding.

36	272
38	570
36	272
138	282
138	284
36	272
74	74
173	612

This is an appeal from an order of the Will County Circuit Court overruling and refusing appellant's motion to set aside and vacate a sale of certain real estate made by the master in chancery, pursuant to a decree of that court in a cause therefore pending therein, wherein the bank above named was complainant and the appellant and others were defendants.

A final decree was rendered in that court on the 25th of June, 1888, finding that the complainant was indebted to the bank in the sum of \$15,324.16, and to John W. Nadelhoffer in the sum of \$8,647.89. The court further found that the claim due the bank to the extent of \$9,493.87 was a first and prior lien upon the property mortgaged to the bank, and that the claim of Nadelhoffer was a second lien thereon to the extent of \$8,647.89; that of the balance due the bank, to the extent of \$5,158.20, was a junior lien to that of Nadelhoffer, and third in the order of payment and satisfaction. Nadelhoffer claimed as a judgment creditor of Dillman, having a lien upon the mortgaged real estate by a judgment, execution and certificate of levy thereon, duly recorded, subsequent in date to the bank mortgage. The decree also found that as against both the bank and Nadelhoffer, the appellant had an estate of homestead in the real estate mortgaged to the bank and levied upon by Nadelhoffer. By the decree the appellant was ordered within ten days from its entry to pay the before mentioned sums of money to the bank and Nadelhoffer, and that in default thereof, "the master in chancery shall proceed according to law to summon three householders as commissioners, who shall, upon oath to be administered to them by the said master, or by any officer authorized by law to administer oaths, appraise the value of said premises, and if, in the opinion of said commissioners, said premises may be divided without injury to the interests of the parties, so as to set off a homestead, including the dwelling house on said premises, of the value of \$1,000, they shall so set off such homestead out of said premises, and the residue of said premises shall be advertised and sold by the master in the manner hereinafter provided. And if, in the opinion of the commissioners, such homestead can not be specifically set off from

said premises without injury to the parties interested, then that the said master advertise and sell all of said premises, or so much thereof as may be sufficient to realize the amount due said bank and the said Nadelhoffer," etc. The decree not being paid as therein directed, on the 10th of July, 1888, a summons was issued, signed by the master in chancery, to three householders, as commissioners severally named therein, to set off and appraise the said homestead premises, and the summons was duly served. On the 11th of July the commissioners, having been sworn, reported to the master that they had duly appraised the premises, that the same were not susceptible of division without injury to the parties, etc., and the whole value thereof was \$13,000. On the 13th of July, 1888, the master signed a notice which, on the same day, was served upon appellant, notifying him of the said appraisement, and that unless within sixty days the said sum of the appraisement, less the \$1,000 homestead, be paid as by law provided, the whole premises should be sold pursuant to the decree. No objection is taken in matter of form to any of the above mentioned proceedings to set off the homestead, and such proceedings all were in due form, as is provided by the statute, unless and except in the following particulars; that the summons, including the names of the persons to act as such commissioner in the body of the summons, the report of the commissioners except signatures thereto, the notice to the appellant thereof and demand of payment in excess of the \$1,000, except the signature thereto, was in the handwriting of one Egbert Phelps, the solicitor of the bank, and the oath to the commissioners, which was in fact as shown by the report, administered by the said Phelps, who at the time was acting notary public, and authorized by law to administer oaths at the time and place, etc.

The appellant having failed to pay the balance of the appraisement under the notice, at the expiration of the sixty days, the master duly advertised the premises for sale pursuant to the decree, and on the 8th of October, 1888, the day and time noticed for sale, sold the same for the sum of \$17,000. The sale was duly reported by the master to the court on the

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24th of October, and on the 31st of that month a rule *nisi* was entered in the cause, requiring all parties in interest to show cause, or the report would be approved.

No cause being shown, under the rule, and no objection being made thereto, that report of sale was approved on the 6th of November, 1888. Thereafter and on the 27th of June, 1889, appellant entered his motion in that court to set aside the master's sale of the said premises, because as claimed in said motion, the homestead of appellant was not legally assigned, nor was the premises legally appraised, and the sale was in other respects illegal and improper. It was admitted in the trial court that the \$1,000 (homestead) had, after sale made, been tendered to appellant, and his refusal to receive the same, and that such sum now remained in the hands of the master, subject to appellant's order.

Upon the hearing of this motion the court below overruled and denied the same and refused to set aside the sale of said premises, and to reverse that order an appeal was taken to this court.

Mr. GEO. S. HOUSE, for appellant.

Messrs. HILL & HAVEN and HALEY & O'DONNELL, for appellees.

UPTON, P. J. We assume that by the pleadings in the original suit of the bank against appellant and others, in the chancery proceeding, there was sufficient to justify that court in rendering the decree it did, and to take cognizance of the homestead rights of the appellant as to the premises here in question, and to provide for setting off the same as it decreed, no question being made upon that point in either the argument or the record before us.

The grounds of error here assigned are:

First. That the commissioners selected to set off appellant's homestead were not sworn by the master in chancery, but by a notary public.

Second. That Egbert Phelps, solicitor for the bank, drafted

all the papers for the master, signatures excepted, and in fact selected the commissioners, instead of the master, as required by law.

First. To sustain appellant's contention as to the first error assigned, our attention is called to Sec. 10 of Chap. 52, Starr & C. Ill. Stats.), which provides, "That if in the opinion of the creditors or officer holding an execution against such householder, the premises claimed as exempt are worth more than \$1,000, such officer shall summon three householders as commissioners who shall, upon oath to be administered to them by the officer, appraise said premises," etc.

The contention of the appellant is that this provision of the statute is to be applied to sales of like character made by the master in chancery under a decree of a court of equity under the provisions of Sec. 8 of the same chapter, which provides: "In the enforcement of a lien in a court of equity upon premises, including the homestead, if such right is not waived or released, as provided in this act, the court may set off the homestead and decree the sale of the balance of the premises, or if the value of the premises exceeds the exemption and the premises can not be divided, may order the sale of the whole and the payment of the amount of the exemption to the person entitled thereto." Under this section it is insisted the master must administer the oath to the commissioners as was required of the sheriff under Sec. 10. It will be seen that Sec. 8 designates no particular manner in which a court of equity shall set off and preserve to the householder the estate of homestead in the enforcement of a lien in equity thereon.

In support of appellant's position, we are cited to the case of *Cummings v. Burleson*, 78 Ill. 281. In that case the main, if not the only, question was, whether the party claiming the homestead had the right to participate in the selection of the commissioners, appear before them and introduce evidence in regard to the value of the premises out of which the homestead was to be assigned; and the court held he had not such right, and in discussing that question said, that inasmuch as Sec. 8 (*supra*) was silent as to the mode of procedure by a

court of equity in enforcing a lien on homestead premises, and as Sec. 10 (*supra*) was specific by legislative directions to the sheriff holding an execution, it was but fair to presume that the legislative intent was that the same course should be pursued *so far as was practicable* by the equity court through its master in chancery, as was required by the sheriff under Sec. 10.

This, in our judgment, falls far short of determining that in such proceedings in equity in the assignment of homestead, no one but the master in chancery could administer the oath provided by law to the commissioners, or that the proceedings must be under the supervision of the master in chancery to the extent as is claimed by the appellant. Indeed, in the subsequent case of *Hotchkiss v. Brooks*, 93 Ill. 386, the Circuit Court sitting in chancery upon bill filed for that purpose appointed commissioners and itself assigned homestead, without in any manner calling in aid the master in chancery, and such action was sustained as an incident to the equity power of that court.

There is no pretense that its procedure in manner or method had been determined in the case of the 78th Ill., although the same learned judge wrote in both cases. We can see no reason why the oath to be administered to the commissioners should be regarded by them as more sacred or of more binding force upon their conscience, if administered by the master, than by a notary public. It was purely ministerial in both cases on the part of the master or notary, and it is beyond our power to comprehend how the rights of the appellant could in the least degree be abridged or impaired or even affected thereby.

It is apparent, we think, that Sec. 2, Chap. 10, Starr & C. Ill. Stats. is sufficiently broad to authorize and empower a notary public to administer the oath to the commissioners to set off the homestead in the case at bar. That section provides that "All * * * notaries public shall have power in their respective districts * * * and jurisdiction to administer all oaths of office and all other oaths authorized or required of any officer or other person, * * * or on any occasion

wherein any affidavit or deposition is authorized or required to be taken."

That construction is given the section above quoted by the Supreme Court in *Edwards v. McKay*, 73 Ill. 570.

Second. That Egbert Phelps, the solicitor for the bank, acted as scrivener for the master in the draft of the summons to the commissioners, which was duly signed by the master in chancery; the acceptance of service thereof by the commissioners, which acceptance was signed by the commissioners severally; the oath to which the commissioners subscribed and which was administered to them; the report of the commissioners, which was duly signed by them, determining the premises not susceptible of division, and fixing the value thereof; the notice to appellant of such appraisal and demand for payment thereof, less the homestead, within sixty days, which was signed by the master and served upon appellant, and service thereof accepted by him, and wrote the aforementioned papers, is admitted.

That Mr. Phelps as scrivener or solicitor selected the commissioners, or had any control of, or took action in that matter other or different, is denied, and is not supported by any evidence, facts or circumstances in the case, as shown by the record.

It can not be overlooked in the case at bar that there is not even a suggestion by appellant's counsel, either in the record or argument before us, learned and astute as he is, that there was any fraud practiced or wrong done by the notary public in drafting these papers, or that either himself or the commissioners in the discharge of the acts and duties assigned them acted corruptly or impartially, or that the rights or interests of the appellant were in the slightest degree prejudiced thereby. On the contrary, counsel for appellant in the argument, in his frank and forcible way, says: "We desire to say that we know Mr. Phelps, the solicitor referred to, and have known him many years, and know he is morally, professionally, and in every other way, as straight as a gun barrel. In nothing that he did was there any intent to abridge the appellant of a single right." We are not aware of any rule

of law which requires the master in chancery to draft with his own hand the papers, of whatsoever character, he may be required in the discharge of his duties to issue or sign.

If the master signed such papers, whether it be a summons or otherwise, he adopts it as his act, and it thereby becomes his act as fully and completely, to all legal intents and purposes, as if he had written it with his own hand. Nor are the commissioners expected, much less required by law or usage, to write the report of their acts, findings or conclusions in the matters submitted to them. When the report is signed by them it becomes, *ipso facto*, their report.

It is a matter of no consequence who drafts the notice of such appraisement, or delivers the same to appellant; if notice is given him in due time and in proper form, it is, we think, proper compliance with the statute of the appraisement made by commissioners. Such has been the uniform construction by all officers as well as by the entire profession, so far as our own experience has extended, and we think it would, indeed, be a startling announcement to hold otherwise.

The *facts*, as contained in this record, also disclose and establish that the scrivener, Mr. Phelps, who drafted the summons, did not appoint, nominate or suggest the commissioners who appraised these homestead premises.

Mr. Phelps testified in the court below, in substance: "My recollection is that before preparing the summons to the commissioners, I suggested the names of one or two persons, neither of whom were selected to act or named in the summons, but, by the suggestion of the other attorneys in the case, including Mr. House, then and now acting solicitor and attorney for the complainant, the commissioners were agreed upon, as inserted in the summons"—and this is an uncontradicted fact in the case.

It is *certain*, also, by facts in this record, that appellant was not prejudiced in any manner by the act or judgment of the commissioners.

It is uncontradicted that the premises were not susceptible of division.

That being so, appellant's interest was to have the home-

stead appraisement as low as, in the judgment of competent men, it could be placed, to the end that he might be enabled to redeem it by paying the amount of such appraisement, less the \$1,000 exemption.

The appraisement was made and the value thereof fixed by the report at \$13,000. In less than ninety days thereafter the premises sold at master's sale for \$17,000. Surely appellant was not and could not have been prejudiced by any act or error of judgment on the part of the commissioners, prejudicial to himself. That appraisement we regard, as all must regard it, as most favorable to appellant, and he can not be heard to complain of errors to his own advantage.

No complaint is made that the commissioners were not capable, suitable and honest men, and acted most indulgent to appellant, but it is said they did not go in a body and personally examine the premises appraised. If it be conceded they did not so go upon the premises or into the house it would be a sufficient answer to say, that the statute did not require them so to do. If they knew the situation and condition of those premises from previous observation or examination sufficiently well to enable them to fix and determine the actual value thereof, upon their oaths, that was all the law required. If they were of the class of men indicated by the evidence and conceded by the arguments and record before us, can we not properly say, that as a legal conclusion, we are bound to presume they had such knowledge from their acts?

We have carefully examined the record before us, in the light of the argument submitted, and we are compelled to say that we are unable to see any merit in the objections to the proceedings in the assignment or attempted setting off of appellant's homestead, in the appointment of the commissioners to set off the same, in their action in the appraisement of the value thereof, or in the acts, doings or neglect of the master in chancery in regard thereto, of which appellant should be now heard to complain, and we think the order of the court below should be affirmed.

Order affirmed.

MARY A. SEXTON
v.
E. H. & A. H. BROWN.

Sales—Failure to Deliver—Evidence—Account Books—Instructions.

1. A memorandum book is not competent evidence on behalf of the person who made the entries therein, without the preliminary proof required by statute as to the character of the book and method of keeping it.

2. The mere fact that the other party saw the entries does not amount to an admission of their correctness.

3. A buyer can not recover damages for failure to deliver goods sold him, the price of which increased after the purchase, unless it is shown that the sale was on time, or that he tendered payment or was ready and willing to pay for them when demand for their delivery was made.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Winnebago County; the
HON. JAMES H. CARTWRIGHT, Judge, presiding.

Messrs. FROST & McEVoy, for appellant.

Messrs. J. C. GARVER and A. E. FISHER, for appellees.

C. B. SMITH, J. This suit was brought by appellees against appellant to recover for a balance due them on flour sold and delivered to the appellant. Several bills of flour were sold and delivered during the year 1888. There is no dispute as to any of the bills except one of February 4th, fifty sacks, at \$55, and March 13th, fifty sacks, \$55. As to these two bills, both appellant and her son deny getting them. This evidence is contradicted by one of the Browns and their drayman, North, who say the flour was delivered. Whether it was or not was a question of fact for the jury, and we see no reason for interfering with their finding. Appellant also claims a set-off against the demand of appellees, on account of appellees' failure to deliver to her the whole number of two hun-

dred 98-lb. sacks of flour, which she claims to have bought, about the 27th day of July, 1883, at \$4.60 per barrel. She insists that appellees only delivered ninety sacks of this last purchase, and that they refused to deliver any more of it, and that within the time this flour was to be delivered flour had advanced to \$7 per barrel, and that in consequence of the advance of flour, and appellees' refusal to deliver, she lost \$2.40 per barrel on the remaining 110 sacks.

She and her son swear that this sale was made about the 27th day of July, and was to be delivered as quick as possible, and that appellant agreed that if flour went down she should have the benefit of the decline. Appellant is not certain whether this purchase was made in June or July. She made no memorandum of it; she had made another purchase in June. Appellee, Brown, denies positively that he made any such sale, or that he delivered the ninety sacks under that sale; but that the ninety sacks were delivered under a former sale. He says his books show no such sale; whether this sale was in fact made was also a question for the jury. The fact that no memorandum was made by either party of any such sale is a strong circumstance against it. It is very improbable that appellee, who was a flour dealer, would contract to sell and deliver that much flour and make no memorandum of it either as to amount, price or time of delivery. At all events it was properly submitted to the jury, and we can not say their finding was wrong.

It is also urged that the court erroneously limited the effect of certain letters and cards introduced in evidence by appellant, written by herself and appellee in reply thereto. By this correspondence appellant wanted to prove the sale of the 200 sacks of flour on July 27th, but the court instructed the jury that they were admitted only for the purpose of proving a sale of flour and a demand for it, but that they did not prove a sale on July 27th. This was correct. There was no reference in this correspondence to any sale made on July 27th, and the correspondence would apply and relate to former sales just as well as to the later sale of July 27th.

Complaint is also made that the court refused to permit

Sexton v. Brown.

certain entries in a small pass-book, made by appellant and her son, to go to the jury. This pass-book was given appellant by appellee when they began dealing with each other, and as flour was delivered and payments were made by appellant from time to time for flour, appellee gave her credit on this book, and made the entry. There were certain entries on this book made by appellant and her son. The court admitted the book as to the entries made by appellee, but rejected it as to the entries made by appellant and her son. The preliminary proof as to the character and method of keeping the books, and that accounts were true and just, as required by the statute, so as to authorize the book to be used in evidence, was not made. Without the preliminary proof it was not competent to use the book in evidence as to the entries not made by appellee, Brown. The mere fact that appellee saw the book and the items and even made no objections to it, did not amount to an admission of its correctness.

There is another objection to the right of appellant to recover damages for the non-delivery of this flour, even if it was in fact contracted for. There is no proof from appellant or any one else that she bought this flour on time, or that she was entitled to receive it without payment on delivery. In the absence of an agreement to sell and deliver on time, the law presumes that the money shall be due and payable on the delivery of the goods. There is no proof that appellant ever offered to pay for this flour when she claims to have demanded it or was then ready and willing to do so. Appellee was not bound to part with his flour without being tendered the contract price.

The proof is that she was already in debt for flour before then delivered, which she had not paid and was not offering to pay for when she was demanding more flour without offering to pay for what she had or what she was trying to get.

Complaint is made that the court erred in giving some instructions on the part of the plaintiff. We find no substantial error in the instructions complained of. They might have been refused with propriety, but inasmuch as there is no proof that the appellant ever offered to pay for this flour or

was ready and willing to pay for it, when she asked to have it delivered, the question of the time of delivery became wholly immaterial, and giving the instructions relating to the time of delivery could not prejudice appellant even if it was not strictly accurate.

The judgment is affirmed.

Judgment affirmed.

GIOCOMO MAFFIOLI

v.

JAMES WELCH.

Malicious Prosecution—Evidence—Instructions.

1. In this action for malicious prosecution, it is held that the proof justified a verdict of \$150 for plaintiff.

2. A person must use reasonable care in ascertaining the facts before causing to be instituted a prosecution for obtaining goods under false pretenses.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Winnebago County; the Hon. JAMES H. CAETWRIGHT, Judge, presiding.

Messrs. FROST & McEVoy, for appellant.

Messrs. J. C. GARVER and A. E. FISHER, for appellee.

UPTON, P. J. This suit was brought by appellee against the appellant for malicious prosecution, to the Circuit Court of Winnebago County. The issues joined therein have been on two occasions submitted to a jury in that court, each trial resulting in a verdict for the appellee.

Upon the last trial the jury found a verdict for the appellee and assessed his damages at \$150, judgment being entered thereon. After overruling a motion for a new trial an appeal was taken to this court, which is now before us for review on errors assigned.

The facts, in brief, are that the appellee, an ignorant, unlettered man, in 1888, was conducting a small store, or "peanut stand," at Rockton, Ill. Both appellant and appellee were Italians, appellant having been in the country and engaged in merchandise for many years in the city of Rockford, Illinois. The appellee, whose real name was Peroni, had been in the country but about four years.

Appellee, in conducting his little store, had purchased some goods, articles of small value, of appellant from time to time and paid therefor, but had no particular acquaintance with appellant.

In January, 1888, appellee, being in want of some further supplies, went to the city of Rockford to make purchase thereof, when he was met by another of his countrymen, named Peter Rossi, who took him to one of the stores of appellant, to whom appellee stated his wants. The purchases he desired to make were quite small, not exceeding \$16 in value. Appellant advised appellee to purchase more goods and save cost in transportation, offered to give him some credit therefor, selected and shipped to appellee tobacco, pipes, candies, canned fruits, maple sugar, etc., making a bill aggregating about \$74. The next day after shipment, appellant went to appellee's place of business, unpacked the goods and marked them for appellee, and told him at what price he was to sell the various articles.

Appellant testified that appellee stated to him when he purchased the goods, that he had \$200 in money in the bank at Beloit, Wis., and would pay the purchase money as soon as he could go there and get it. Appellee denies that he made any statement or agreement of that kind or that he had any money in the bank at Beloit, or elsewhere, but that the goods were sold to him on credit, at the instance and advice of appellant.

A short time thereafter, appellee, as he claims, having obtained in the venture much experience but little money, sold out to one Edward Martin for the sum of \$45, received \$25 on a debt due Martin from appellee, and received \$20 in cash, which appellee offered to pay to appellant on his account, and proposed to pay the balance due from time to

time thereafter as he could earn it, which proposition not being accepted, appellee, quite contrary to the custom in such cases, went to work chopping cord wood, and while so engaged was arrested at the instance of appellant, upon a capias issued upon his complaint, committed to the jail or "calaboose" of the village, detained during the night and the next morning discharged.

The complaint upon which appellee was arrested, charged that the goods sold by appellant to appellee as above stated, were obtained "by false pretense, to wit, by falsely pretending that appellee had \$200 in money deposited in bank belonging to him, did obtain the goods (describing them) with the intent thereby to defraud the appellant out of the said goods and chattels, when in fact the appellee did not have \$200, or any part thereof to pay for said goods, etc., and did not and would not pay therefor."

On the day following his discharge, appellee was again, at the instance and procurement of appellant, arrested upon the same charge, bound over and committed to the common jail of the county, and there remained sixty-two days, when the grand jury, upon investigation of the charge, refused to find an indictment against appellee, and he was discharged from imprisonment.

Thereupon this suit was commenced with the results above stated.

It is apparent from what has been said that appellee's right of recovery in this case rests entirely upon questions of fact as to the question of malice and want of probable cause, and after careful examination of the record before us, we think the proof justified the verdict and that the instructions were substantially correct.

Appellee's ninth instruction complained of, which requires appellant to use reasonable care in ascertaining the facts upon which his statement to the magistrate issuing the capias, and his attorney advising the proceedings, were based, was correct, as was held in *Roy v. Goings*, 112 Ill. 656.

Finding no reversible error in this record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

MARTHA L. CURTIS

v.

POLLY HARRISON AND WILLIAM H. HARRISON.

Contracts—Conditional Delivery—Evidence—Pleading—Instructions.

1. In an action for breach of contract it is competent under the general issue to show by parol evidence that the contract was delivered conditionally.
2. In such action defendant may, after having gone to trial on a plea of the general issue, file a sworn plea denying delivery of the contract.
3. In an action for breach of a contract to purchase a monument, this court holds that the contract was incomplete on its face, and should not have been admitted in evidence.
4. An instruction which invites the attention of the jury to matter not really in the case is improper.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Winnebago County; the
HON. JAMES H. CARTWRIGHT, Judge, presiding.

Messrs. CHARLES A. WORKS and HENRY V. FREEMAN, for
appellant.

The court erred in refusing to permit the introduction of evidence for appellant, showing that the alleged contract in question was never actually completed or delivered.

The evidence in question showed a good defense to the action, and was admissible by parol proof.

The facts show and constitute a merely conditional delivery, and as the conditions were never fulfilled, the contract in question was never finally delivered, and did not become a binding contract. *Jordan v. Davis*, 108 Ill. 336.

In this case the court say: "The delivery of a written contract is indispensable to its binding effect, and such delivery is not conclusively proved by showing the placing of the paper by the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends on whether

the parties at the time meant it to be a delivery to take effect presently."

The court further says in the same case: "The verbal agreement for the lease was not offered in contradiction of the terms of the lease, but to disprove delivery. The question of delivery is something aside from the writing in an instrument. It depends upon proof by parol, and the evidence of delivery arising from possession of the deed by the grantee may be rebutted by the same kind of evidence by parol.

The court also quotes approvingly the following language from 3 Washburn on Real Property, 292-3, as follows:

"It is an essential prerequisite that the instrument in question should be understood by the parties to be completed and all ready for delivery, in order to have a mere placing it in the hands or possession of the grantee or his agent construed into a delivery. * * * While, therefore, it is not competent to control a deed by parol evidence when it has once taken effect by delivery, it is always competent, by such evidence, to show that the deed, though in the grantee's hands, has never been delivered."

And Bishop on Contracts, Sec. 357, says that "A parol condition that its operation shall commence only on the transpiring of a future event, will be good."

Messrs. Frost & McEvoy, for appellees.

The testimony involved the execution of this contract, and by their pleadings they had raised no question as to the execution. Counsel for appellant are too good lawyers not to know that if they proposed to question the execution of this contract, not the mere signing of it, they must verify their plea by an affidavit—and it serves to demonstrate the fact that the attempted testimony was clearly an afterthought, that they had not attempted by their pleadings to question its execution until after appellee's case had been closed.

The execution of a contract involves its delivery as well as signing, and when they questioned its delivery they questioned its execution, and under the statute they must do so by verified plea. 2 Starr & Curtis Stat., 1798, Sec. 34.

Curtis v. Harrison.

Execution of a contract involves its delivery as well as its signing. Hepp, etc., v. Huefner, etc., 61 Wis. 148-151; Tiernan et al. v. Fenimore, 17 Ohio, 545-552; Boyle v. McNickle, 9 Cal. 430; Little v. Dodge, 32 Ark. 453; Ricketts v. Harvey, 78 Ind. 152.

C. B. SMITH, J. This suit was brought by appellees against appellant to recover damages for a breach of a contract to erect a tombstone. Appellant was the widow of Rev. W. S. Curtis, deceased, and desired to procure an appropriate monument to be erected over his grave. Appellee, Wm. H. Harrison, called on appellant at her home in Rockford where he was an entire stranger and introduced himself and his business under circumstances and by methods which, to say the least, were unusual and peculiar.

In the view we take of this case it will not be necessary to go much into the facts detailed in the record, and inasmuch as the case must be remanded for another trial upon its merits, we shall forbear any discussion or reference to that branch of the case beyond what may be necessary to properly dispose of the questions raised on the record.

The record discloses that Mrs. Curtis was an old lady, and that since the death of her husband the question of procuring a suitable and somewhat expensive monument for her husband's grave had been a subject of discussion between herself, her children and son-in-law. Some negotiations had been had with one Adamay, an agent of some other concern. William H. Harrison, one of appellees, learned of appellant's desire to purchase a monument, and went to Rockford to see her, and after exhibiting to her his samples of granite and marble and various designs, he finally procured her signature to a contract for a monument to cost \$500.

The blank contract was filled out in pencil and referred to a certain design for the monument by a number "784." The following is a copy of the contract:

"\$500.

ROCKFORD, May 11, 1886.

"I have this day bought of J. E. Harrison & Son, Adrian, Michigan, a granite monument, design No. 784, now in their

possession. Material of said monument Concord granite.

"Ground base to be 5.0 x 3.2.

"Die to be polished *front and back and margined*.

"And inscribed as follows:

"Family name, *Curtis*.

"Total height, *5 feet*.

"Remainder of monument to be built in proportion to design.

"Said monument to be delivered and erected in a proper and workmanlike manner at *E. Side Cemetery, Rockford*, township of *Rockford*, county of *Winnebago*, State of *Ill.*, on or before *Oct. 1, 1886*, or within a reasonable time thereafter; for which *I* agree to pay *J. E. Harrison & Son* or order *five hundred* dollars at date of delivery.

"Foundation to be built by purchaser. All notes to be taken on company blanks bearing legal interest.

"The within contract to be subject to the approval of *J. E. Harrison & Son*. Any agreement not included in this contract shall not be binding on *J. E. Harrison & Son*.

"*MRS. WM. S. CURTIS.*

"*J. E. HARRISON & SON*, per *W. H. Harrison*,
Soliciting agent.

"Postoffice address: Nearest shipping point.
602 Seminary St.

"Note: The italics in the above, represent pencil marks in the original."

After the above contract was made and delivered to *Wm. H. Harrison*, and on the next day, *Mrs. Curtis* became satisfied that she had been swindled and that a fraud had been perpetrated on her, and she accordingly wrote *Wm. H. Harrison*, informing him that he need not erect the monument, and so far as it was in her power to do, canceled her contract and refused to allow *Harrison* to erect the monument. This suit was afterward brought to recover for that breach of the contract, and upon a trial had before the court and a jury, the plaintiff recovered a verdict for \$200, upon which the court, after overruling a motion for a new trial, gave judgment.

The case is now before us on appeal and numerous errors assigned, among which is the admission of improper evidence for plaintiff, and rejection of proper evidence for the defend-

ant, and in giving erroneous instructions for the plaintiff.

The plea on the trial below was the general issue. The principal question on the trial was whether or not there was an absolute or conditional delivery of the contract. In chief, the plaintiffs introduced the contract, and proved their readiness and ability to perform the contract, and the refusal of appellant to permit them to erect the monument, and proved that their profits on the contract would be about \$300, and rested their case.

Appellant admitted making the contract and its delivery in fact, but contended that the delivery was a conditional one, and was not to take effect and be in force until after it had been shown to her children and son-in-law, in Chicago, and ratified and approved by them, and that when it was delivered to Harrison, it was agreed and understood between herself and Harrison that he would take the contract to Chicago and submit it to appellee's children and son-in-law, for their approval or rejection, and that he had not done so. This proof was held by the court to be inadmissible under the general issue, not verified by affidavit.

Thereupon counsel for appellant asked leave to file a plea, verified by affidavit, instanter, but the court refused to allow such plea to be filed, and excluded all evidence tending to show a conditional delivery of the contract, to all of which rulings appellant excepted. We think the court erred in rejecting this proof under the general issue, and also in refusing appellant the right to file a sworn plea, even if that kind of a plea had been necessary.

While in a certain sense the complete execution of an instrument in writing may exclude its delivery, so as to make it a proper cause of action, still there is an important sense in which the actual making and signing a paper is one thing, and the actual delivery to another is quite a different thing. A paper writing signed by some one speaks for itself as to what is upon it, but whether it was delivered in fact to another, and if so, upon what terms or conditions, may and often does rest only in parol. If it was not in fact delivered, or if delivered upon conditions never performed, then it never became a valid and binding contract, and so in legal effect was

no contract and would fall under the denial of the general issue.

Proving *non* or conditional delivery is not denying the execution of a written contract within the meaning of the statute, but denies the existence of any contract at all. *Jordan v. Davis*, 108 Ill. 336; *Bishop on Contracts*, Sec. 170; *Ames v. Quimly*, 106 U. S. 342.

It was also error to refuse appellant the right to file her sworn plea, denying the fact of delivery, to meet the view of the court. Under our statute, permitting reasonable and necessary amendments to enable parties to maintain or defend a suit, so that the ends of justice may be met, is not a matter of discretion with the court. The statute is mandatory. *Misch v. McAlpine*, 78 Ill. 508; *Chandler v. Frost*, 88 Ill. 559.

Under the broad and liberal provisions of our statute, no mere technicality, mistake or omission on the part of the pleader at any stage of the case prior to final judgment in any plea, writ, process or proceeding, shall bar the right of the parties to correct the error then and there by amendment to be made under such reasonable terms as the court shall deem consistent with the principles of justice and equity.

We think the court erred also in admitting the contract above set out in evidence. It will be seen upon inspection the contract on its face is an incomplete and imperfect contract.

The blank left for the words to be inscribed on the monument is not filled out. The blank left for the family name of the deceased is simply filled with the word "*Curtis*." A monument furnished according to this contract with no inscription upon it except the single word "*Curtis*" could hardly be claimed to be such a monument as appellant intended to erect, or was contemplated by the contract, in memory of her deceased husband, and for which she was to pay \$500.

We think the fifth instruction ought not to have been given for appellees. It invited the attention of the jury to a matter not really in the case. There was no claim on the part of appellant that the contract contained anything that she had not authorized to go into it. The instruction was liable to mislead the jury to the detriment of appellant.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

C. AULTMAN & COMPANY

v.

L. H. WYKLE.

Sales—Warranty—Instructions.

1. One can not enforce a warranty imposing mutual and dependent obligations and covenants until he has shown compliance on his part.

2. A provision in a contract of sale warranting a machine to do good work, which requires the purchaser to give notice of dissatisfaction within five days, and makes his failure to do so evidence of fulfillment of the warranty, is just and binding.

3. In case of such a provision, it is error to instruct the jury that the purchaser had a right to test the machine for a "reasonable time."

4. An instruction is erroneous if there is no evidence to which it can apply.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Peoria County; the Hon. JOHN BURNS, Judge, presiding.

Messrs. HOPKINS & HAMMOND, for plaintiffs in error.

In *Bayliss v. Hennessy*, 54 Iowa, 11, and in *Paige v. McMillin*, 41 Wis. 337, it is held, under a contract which provided that the cutting of more than five acres of grass with a mowing machine should be conclusive evidence that it fulfilled the warranty, that the purchaser could not recover for breach of warranty after he had cut more than five acres of grass with the machine.

In *Boothley v. Scales*, 27 Wis. 266, it is held that under a contract providing a time in which notice shall be given that the machine fails to fulfill the warranty, notice given after the expiration of time will not authorize a recovery for breach of warranty.

In *Upton Manufacturing Co. v. Huiske*, 29 N. W. Rep. 621, and in *King v. Towsley*, 64 Iowa, 75, it is held, under a contract of warranty for limited time, that unless notice was

given of a breach within the time limited there could be no recovery.

In *J. I. Case Threshing Machine Co. v. Vennum*, 23 N. W. Rep. 563, in the Supreme Court of Dakota, the contract in question was almost identical with that in this case, except the limitation stipulated was two weeks instead of five days. The action was upon notes given for a ten-horse power threshing equipment. The defense was breach of warranty by failure to perform. No notice of the failure to perform was given within the time stipulated, but was given after its expiration.

Hudson, J., in delivering the opinion of the court in that case, says: "It is a fundamental principle of law that has never been departed from by any respectable court, that when the obligations of an express warranty are concurrent, either who seeks to enforce the obligations of the other must prove performance on his part, or an offer to perform." *Abb. Tr. Ev.* 313; *Durham v. Pettee*, 8 N. Y. 508; *Nichols v. Knowles*, 18 N. W. Rep. 413; *Wendall v. Osborne*, *Id.* 709; *Worden v. Sycamore Harvester Co.*, 7 N. W. Rep. 756.

Mr. L. HARMON, for defendant in error.

C. B. SMITH, J. This was an action in assumpsit brought by appellant against appellee, upon three promissory notes, executed by appellee in payment of a certain traction engine and separator bought by appellee from C. Aultman & Co. Two of the notes were each for \$533, and the other for \$534, and they were payable respectively December 1, 1881, December 1, 1882, and December 1, 1883, and all payable to appellant. These notes were not all due when this suit was begun upon the first one. There was a stipulation entered into that the plaintiff might amend his declaration and declare upon all the notes, as if they were due, without objection upon that ground, and that defendant should then plead the general issue, and give in evidence under that plea any and all evidence which might be given under any special plea well pleaded.

The sale was made through G. W. Rouse, agent for appellant at Peoria. A trial was had before the court and a jury,

which resulted in a verdict for the plaintiffs for the sum of \$128.81. The plaintiffs not being satisfied with this verdict moved the court for a new trial, but the court overruled the motion and entered judgment on the verdict, to which appellant excepted, and now brings the case here upon a writ of error and asks for its reversal.

The purchase of the engine and separator was made upon one of the printed orders and contracts of appellant, and after it had been carefully filled up with everything included in the purchase, it was addressed to appellant and signed by appellee, and forwarded to appellant's shops, in Canton, Ohio, and in due time the machinery called for in the order and contract was delivered to appellee, and he executed the three notes above described in payment for such machinery, and delivered them to appellant or to Rouse for appellant. The machinery was ordered and sold under a printed warranty set out in the contract and signed by appellee when he ordered the machinery. No question arises upon any part of said contract, except the clause relating to the warranty, which is as follows:

"Warranty.—The above machinery to be warranted, with proper usage and management, to do as good work as any other of its size made for the same purpose in the United States, and to be of good material and durable, with proper care. If inside of five days from the day of its first use, the said machine shall fail to fill said warranty, written notice shall be given to C. Aultman & Co., Canton, Ohio, and also to the local agent of whom machine was purchased, stating wherein it fails to fill the warranty, and a reasonable time allowed to them to get to the machine and remedy the defect, if any there be (if it be of such nature that a remedy can not be suggested by letter), the undersigned rendering necessary and friendly assistance.

"If the machine can not be made to fill the warranty, it shall be returned by the undersigned to the place where received, and another furnished which shall perform the work, or the money and notes which shall have been given for the same to be returned, and no further claim to be made on C. Ault-

man & Co. If within five days from its first use the above ordered clover hulling and cleaning attachment shall fail to perform its work as above warranted, and C. Aultman & Co. fail to make it work after notice has been given as above provided, it is to be returned to the place where received, and the money or notes given for the same are to be returned to the undersigned. It being especially understood and agreed that the failure of the said clover hulling and cleaning attachment to perform its work as warranted shall not condemn or be grounds for returning any part of the above machinery, except the said clover hulling and cleaning attachment.

"It is further mutually understood and agreed that continued use of said machinery after the expiration of the time named in the above warranty, shall be evidence of the fulfillment of the warranty and full satisfaction to the undersigned, who agrees thereafter to make no other claim on C. Aultman & Co. And, further, that if the above named machinery, or any part thereof, is delivered to the undersigned before settlement is made for the same, as herein agreed, or any alterations or erasures are made in the above warranty, or in this special understanding and agreement, the undersigned waives all claims under warranty. L. H. Wykle."

The only defense made to these notes upon the trial was the alleged failure of the warranty, in that the machine did not do good work. Upon the trial a great many witnesses were sworn and examined as to the character and quality of the work done by the machine. In the view we take of the case it is unnecessary to go into that branch of the case. It will be seen that the warranty under which appellee bought this machine limited him to five days' use of it, after it was first used, and if within that time it failed to fill the warranty, then it was the duty of appellee within that time to give written notice to C. Aultman & Co., Canton, Ohio, and also within the same time to give notice to the local agent (Rouse), of whom the machine was purchased, in which notices it should be stated in what respect the machinery failed to fill the warranty, and that thereafter a reasonable time should be

given to the seller to get to the machine and remedy the defects, if any. The warranty in another clause provides "that the continued use of said machinery, after the expiration of the time named in the above warranty (five days), shall be evidence of the fulfillment of the warranty and full satisfaction to the undersigned (L. H. Wykle), who agrees thereafter to make no further claim on C. Aultman & Co." These two clauses in the warranty are material and substantial parts of it, and are for the protection of the seller, and the purchaser is no more at liberty to disregard them than he is any other clause of his contract. When he made this contract he agreed that he would satisfy himself within five days whether this machine worked to his satisfaction and filled the warranty, and he further agreed that if it did not he would within that time give the notice required by his contract, and if he failed to give such notice within five days, then he agreed to release appellant from all claim of damage on account of such machinery. These provisions in this contract are too plain to admit of any argument or controversy, and need no construction. If appellee complied with these provisions of his contract, then he can be heard to show that the warranty failed; if he did not comply with them, then his mouth is closed by his own agreement, and he can not show that the machinery did not comply with the warranty. It is no answer to these requirements of the warranty that five days was an unreasonably short time to find out any defect in the machinery, and to give the notice. If that were so, appellee knew that fact as well before he signed the contract as afterward, and should have refrained from making it, if he did not intend to, or could not, comply with its terms.

Now under the proof in this case there is no claim or pretense that appellee gave any of these notices within the time limited. He himself swears that he commenced using this machine about the middle of July, and used it almost continuously until after the State Fair in the fall, and that up to that time he never made any complaint to Rouse, of whom he bought it, or sent any notice to C. Aultman & Co., at Canton, Ohio. He totally and utterly ignored that part of his contract

until he used the machine the most of the season, and threshed all the grain he could get to thresh, and then went to the State Fair and used the engine to operate machinery on exhibition until after the Fair was over, and when removing his machine and going up a muddy hill he got swamped in the mud, then for the first time he himself swears he told Rouse he would have nothing to do with the machine. This notice came long after the time he had any right to give it, and he is now estopped by the terms of his contract and from his own testimony from making the defense of a breach of warranty against these notes. *Shepard & Co. v. Knowles*, 31 Minn. 489; *Shepard & Co. v. Rort*, 35 Minn. 353; *Boothley v. Scales*, 27 Wis. 337; *Upton Mfg. Co. v. Haisk*, 29 N. W. Rep. 621; *King v. Towskey*, 64 Iowa, 75.

So where one seeks to enforce a warranty imposing mutual and dependent obligations and covenants, he who seeks to enforce it must show compliance on his part before he can insist on performance by his adversary. *Durham v. Petted*, 8 N. Y. 508; *Nichols v. Knowles*, 18 N. W. Rep. 413. When appellee informed Rouse that his engine had been swamped in the mud, and that he could not get it out, Rouse volunteered to assist him to get it out, and sent two men to get it out for him. Appellant then offered to prove under what circumstances his agent, Rouse, had assisted appellee, and what was said at the time, but the court refused to allow this testimony. It was sought by some means to bind appellant to some kind of an admission, or waiver of his contract, by this friendly act of Rouse in sending his men to help appellee, though in what way it could affect appellant we are not able to understand. We think appellant was entitled to this explanation of that act and it was error to refuse it.

On the trial appellant requested the court to give these instructions, but the court refused them :

"The jury are further instructed that in no case would the defendant, under the terms of the article or contract given in evidence, be entitled to damages, even if the jury find from the evidence that the machinery in question did not fulfill the warranty. For by the terms of the contract it was his duty

to give the machinery such trial as the contract contemplates, and if it failed to fulfill the warranty, to give such notices and return the machinery, as the contract provides, and if he neglected to give the notice or return the machinery in the manner provided by the contract, but continued to keep and use it even to his own detriment, he is not entitled to any damages either as a set-off against the notes or otherwise.

“The jury are further instructed that the provisions of the warranty clause contained in the order or agreement given in evidence concerning the purchase of the machinery in question in this suit, that the defendant should, ‘inside of five days from the day of the first use by him of said machinery,’ give notice of any failure of said machinery to fulfill the warranty to the plaintiff and to the local agent of whom he purchased it, and that the continued use of said machinery after the expiration of the said time should evidence a fulfillment of the warranty and satisfaction to the defendant, is just as binding and conclusive upon the parties as any other provision of the contract, and the jury can not lawfully find that the same has been waived or released, unless they believe from the evidence that there is a preponderance of all the evidence in the case that the same has been released or waived.”

These instructions proceeded upon a correct construction of the warranty, and should have been given, and it was error to refuse them. Other instructions were asked by appellant embodying the same idea or construction, but they were all refused or modified, so as to make them erroneous.

The court, on its own motion, gave the following instruction: “The jury are instructed that the machinery sold under the written contract by the plaintiff to the defendant is warranted thereby to the defendant with proper usage and management by the defendant to do as good work as any other machine of its size made for the same purpose in the United States, and to be of good material and durable, with proper care. Under the said contract and warranty the defendant had the right to take and use the machinery in a reasonable and careful manner in the business and work for which it was manufactured and sold by plaintiff to him for a

reasonable length of time, for the purpose of testing fairly its sufficiency to perform the work for which it was designed by the terms of said contract and warranty; and it was the duty of defendant to make a test of said machinery with due care and diligence, and within a reasonable time, due care and diligence to be used. And the measure of a reasonable time for the test are matters of fact to be determined by the jury in the light of all the facts and circumstances appearing in the case, and under the law of the case as defined by the court, the care and diligence must be such as an ordinarily prudent man would use under like circumstances acting in good faith to accomplish the purposes of such test of the sufficiency of such machinery."

It will be seen that this instruction utterly ignores every condition in the warranty for the protection of appellant, and instead of limiting the right of trial to five days, it tells the jury appellee had a right to use it a reasonable time for the purpose of testing its sufficiency to do the work for which it was made. These parties had made their own contract and they were bound by it, and the court had no right to inform the jury that appellee could repudiate that contract. The court gave the jury another instruction at the instance of appellant, in general terms, to the effect that the parties were bound by the terms of their contract, but before giving it added these words: "Unless the plaintiff had waived it." This modification was erroneous, for there is no evidence in the record that appellant ever waived any of the terms of the warranty either by word or deed.

A great multitude of instructions were asked, some given, some refused and some modified, and many of them drawn out at great length.

A discussion of each of them would serve no useful purpose. In those we have considered we have sufficiently indicated our views as to the law governing the case, so as to enable the court upon a subsequent trial to correctly apply the law, so that the parties shall be bound by the terms of their agreement. Because the verdict and judgment is mani-

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festly against the evidence and the law, and because of the erroneous rulings of the court upon the admission of the evidence above indicated, and for refusing proper and correct instructions for appellant, and giving erroneous instructions for appellee, this judgment will be reversed and remanded.

Reversed and remanded.

CITY OF ELGIN

v.

JOHN JOSLYN.

Municipal Corporations—Public Work—Contracts—Construction—Extras—Practice—Estoppel—Remittitur—Evidence.

1. Where a contract contains general technical words appropriate to a particular trade, parol evidence from those familiar with the trade as to the meaning of the words is admissible.

2. In an action against a city for labor and material furnished under contract, this court declines to interfere with the verdict for plaintiff.

3. Where a city with which a person has contracted to do certain work within a certain time, takes the work out of his hands without his default, such person may quit the work and sue on the *quantum meruit*.

4. Where such contract provides that no extra work shall be allowed or paid for, unless done on the written order of the city engineer, and further provides that the contractor's claim for extra work must be made in writing within a certain time, the failure of the engineer to put his orders in writing will be considered a waiver of the right to insist on the contractor's putting his claim in writing.

5. In an action on such contract it is *held*: That the above provisions apply only to minor and unimportant changes incident to the contract, and likely to occur in carrying it out, and not to radical changes and departures from the plans.

6. The city can not wait until the extra work is completed before insisting on the contractor's complying with the above provision, but must do so when the work is ordered.

7. Assumpsit will lie for property wrongfully taken and converted to one's own use.

8. Courts will not reverse for unimportant errors in the progress of a trial, or in instructions which have not misled the jury, and do not affect the merits of the case.

9. Appellant can not assign as error the court's action in permitting appellee to remit part of the verdict before entering judgment thereon.

36	301
136	525
37	301
67	118
67	677
38	301
85	551
86	301
187	324

86 301
e110 219

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. BOTSFORD & WAYNE, for appellant.

Messrs. CHARLES WHEATON and A. H. BARRY, for appellee.

C. B. SMITH, J. This was an action in assumpsit brought by appellee against appellant, to recover for work and material done and furnished in and about the erection and construction of the buildings connected with the waterworks belonging to the city of Elgin. The declaration contained only the common counts, to which was attached an itemized bill of particulars amounting to over \$3,000.

The defendant interposed various pleas, under which the defense was made without question, and as no question arises on the pleadings no further attention will be given them.

A trial before the court and jury resulted in a verdict for the plaintiff Joslyn for \$2,400.92. A motion for a new trial was made, and thereupon the plaintiff remitted \$400.92 of the verdict, and the court then overruled the motion for a new trial, and gave judgment on the verdict, to all of which the city excepted. The city now brings the record here on appeal and asks for a reversal.

This controversy grows out of a written contract entered into between appellant and appellee on the 16th day of June, 1887, whereby appellee agreed with the appellant "to furnish all the labor and material required to do the excavation and mason work on the pump, well, the pumping station buildings, and the foundation and pedestal for the stand pipe of the Elgin City Water Works in accordance with the designs, plans and specifications, both general and special," and for this work and material the city agreed to pay appellee \$11,311 in the manner provided for in the printed specifications.

Shortly after the execution of this contract, appellee entered upon the work. Soon after the work was begun, departures

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and changes from the plans and specifications began, and these changes, both in the material used and in the construction of the work, continued to a greater or less extent during the progress of the work.' The work was not finished within the time specified in the contract, and appellee insists that the frequent changes both in the manner of doing the work and in the material used, and the constant interference with him and his men by the officers of the city in the progress of the work was the sole cause of the delay. Appellee continued the work until the city had paid him, under the engineer's certificates, the whole contract price except \$200, as he claims, but according to the claim of the city he was overpaid \$267.48. Before the work was fully completed the city took possession of it, and took the work practically out of the hands of appellee and proceeded to finish it. The principal work, however, remaining to be done when the city took possession, related to the laying of sewer and suction and inlet pipes. This work the city completed and now seeks to charge the expense of this and other work it did, to appellee, and offset it against any claim he may have for extras. Appellee, however, denies that this work of laying sewers and pipes was in any manner included in his contract, and that it was not "mason work" which he was bound to do. In his bill of particulars appellee made only a claim of \$200 for a balance due on his original contract, but upon the trial he abandoned that claim and sought only to recover for extras and extra labor and material furnished by him on account of the change in the work done under the direction and by authority of the city.

The defendant sought to meet and defeat this claim, 1st, by offsetting the damages it claimed by a failure on the part of appellee to do his work according to his contract, and within the time he was to do it; 2d, by charging the expense of completing the work, including the laying of sewers and pipes, to appellee; and, 3d, by showing that the work and material charged by appellee as extras were not extras; or if they were, that they were worth less than the amount claimed.

A preliminary question arises here upon the action of the court in admitting parol evidence from mechanics or persons

skilled in mason work to show whether the work of laying sewer, suction and connecting pipes was included in the general term "mason work." This evidence was admitted over the objection of appellant, and it now insists the court erred in admitting that evidence. In this we think there was no error. We think the rule is general, if not of universal application, that where writings or contracts contain general words appropriate to particular trades or branches of business having a technical signification or sense, as applicable to the trade or business in which they are used, parol evidence may be received from those who are familiar with the particular trade or business as to the meaning of such words. *Myers v. Walker*, 24 Ill. 133; *McAvery v. Long*, 13 Ill. 147; *Brown v. Brown*, 8 Met. 576; 1 Greenleaf, Evidence, Sec. 280.

Nor is this submitting the construction of a contract to the jury. It only submits to them the question of what the parties meant by the use of the particular words under consideration, from extrinsic evidence, and this must be submitted to the jury, because it is a question of fact and not of law.

This evidence being properly admissible, the whole contention on the part of both parties was a mere question of fact for the jury, and unless we can clearly see that they erred in their finding or have been governed by prejudice or passion, to the prejudice of appellant, we are not authorized to set aside their finding.

The record in this case contains nearly one thousand pages, mostly covered with a transcript of the evidence. The two abstracts furnished us cover nearly two hundred printed pages. Anything like a general review and discussion of this immense mass of testimony would be utterly out of the question in this opinion, and serve no useful purpose whatever. We shall content ourselves, and discharge our duty as far as possible, by stating our conclusions only. We have carefully read the evidence and think it supports and justifies the finding of the jury. The evidence, in many instances, is very conflicting, and it was for the jury to say where the truth lay.

Upon the question as to the right of the defendant to

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recover damages, by way of recoupment or set-off, for a failure on the part of appellee to complete his contract, it is sufficient to say that the proof tends strongly to show that the city took charge of the work and took it out of the hands of appellee, or so far, at least, took it out of his control as to justify him in abandoning it without his fault. If the proof established such interference on the part of the city without the fault of the defendant, then appellee would be justified in quitting the work and suing on the *quantum meruit*. *Guerdon v. Corbitt*, 87 Ill. 272. And the city in that case could not recoup or set off for money expended in the completion of such work without proof putting the defendant in default, and showing that such default or neglect of the defendant to do his work was not caused by the acts of the city in changing the contract so as to require more time or work or material, or improper interference on the part of the city with the plaintiff in the progress of the work. There is a constant conflict in the evidence as to whose fault caused the delay in the completion of the work, and if damage resulted to the city from that cause, we can not say, from the evidence, that the city was so free from fault or responsibility as to make appellee responsible to it for such damages. We think one of the chief causes of the delay was the frequent changes in the plans occurring at the request of the city. The jury found specially that the defendant was not entitled to any damages against appellee for the alleged non-performance of his contract, and, also, that no amount should be allowed the defendant under his plea of set-off. This finding of the jury is strongly supported by the fact that appellant paid appellee almost all, if not the entire price agreed upon for the entire work, in its completed condition, according to his contract, under the monthly certificate of appellant's engineer, stating the work done and material furnished. Appellant insists that appellee was overpaid the full contract price of the work by the sum of \$267.48, and the verdict of the jury supports appellant in that regard. The contract required the appellant's engineer to know what work was done and material furnished, and appellee could not draw a dollar of his pay until the

engineer certified that he had earned it and was entitled to it. Appellant's present attitude, in claiming damages of appellee for failing to comply with his contract and failing to do his work as agreed, is in direct conflict with the certificates and estimates of its own engineer, who ordered appellee paid after a careful inspection of his work and the materials furnished under the contract.

It is also objected that the jury failed to answer directly and specifically one of the questions submitted to them to be answered in their special verdict. The question submitted was: "What amount, if anything, under the evidence, is the plaintiff entitled to have from the defendant for work, labor and materials done and furnished by him under his contract, and which are not included as extras?" The answer to this question by the jury was, "No amount is due the plaintiff under said contract except the extras, as stated in his bill of particulars."

We are not able to see the force of this objection. It is difficult to see how the jury could have more accurately answered the question.

It is again insisted that appellee can not recover for extras, no matter how many were furnished nor what their value, by reason of a clause in the general specifications relating to extra work, which provides: "No extra work will be paid for or allowed unless the same was done upon the written order of the engineer. * * * All claims for extra work must be made to the engineer, in writing, before the payment of the next succeeding estimate after the work shall have been performed, and, failing to do this, the contractor shall be considered as having abandoned his claim." The provisions of this clause are mutual. The proof is, in this case, that the engineer of the city and the city officers—the water commissioners—had the charge and supervision of this work, and were constantly proposing and requiring changes and departures from the original plans, and that many of these changes were of a material and important character, involving more expense than the original plans. One witness, at least, swears that the finished work could hardly be recognized by looking at the

original plans. Under the provision in question, if the engineer and city which he represented intended to enforce that provision against the contractor, and avail themselves of its benefits, then it was their duty also to obey it. And it was the duty of the engineer or the commissioners, when they ordered extra work, to put it in writing themselves. By the strict letter of this clause no extra work is allowed to be done except it is ordered by the engineer, in writing. He is to make the order, and must put it in writing, and his omission to do his duty and comply with the contract can not be invoked to aid the defendant; nor can the defendant omit to comply with its part of the requirements of that clause, and at the same time insist on a strict compliance with it on the part of appellee. The neglect of the defendant to keep its part of that clause must be held to be a waiver of the right to insist on the plaintiff keeping his part of it.

But we do not think this clause in the general specifications was ever intended by the parties to it to cover so many and substantial and material changes from the original plan as occurred in this work. This clause was only intended and must be held to apply to such minor and unimportant changes as would be likely to occur in carrying out, and be incidental to, the plans, and in fulfillment of them, and not to radical changes and departures from the plans. This construction was placed upon a similar provision in a building contract by the Supreme Court, in the case of *Cook County v. Harms*, 108 Ill. 151. Aside from the foregoing considerations, we are of opinion that the clause in question may be waived by the acts of the parties. The clause is highly penal, substituting the arbitrary judgment and decision of an engineer in the employment of one of the parties in place of the judgment of a court, and requiring all claims, big and little, for extra work or material to be put in writing within a certain time, or all claim for them forfeited. It is strictly a "cut-throat" claim in building contracts, liable to entrap the unwary contractor, and if beneficiaries under such contracts intend to enforce them, they should insist on it when they order the change, or extra work or material; and upon failure to insist at the time

upon such compliance, then they will be estopped from insisting upon such provisions after they have secured the labor and material of the contractor.

It is further insisted that the plaintiff can not recover in assumpsit for the wrongful conversion of appellee's tools, machinery and material by the city. It is in proof that when appellee quit the work, he left a lot of tools and material on the ground where he had been doing the work and that when the city took possession of the work they also took possession of plaintiff's tools, machinery and material, and used them in the completion of the work. For such material of appellee's as was used and for such tools and machinery as were destroyed by appellant and its servants in completing the work, appellee charged up in his account against the city and recovered for in this suit.

The claim of appellant is that unless the proof shows that the wrongful taking of the goods was followed by the conversion of the goods into money or money's worth, or a subsequent promise was made to pay for them, the plaintiff can not recover in assumpsit. Even under the language used in the authorities relied upon by appellant, assumpsit will lie under the proof in this case. Taking goods wrongfully and keeping them and applying them to one's own use, and wearing them out, as for example eating up a beef, or wearing out a rope and derrick, or using lumber in building a house, would seem to be equivalent to reducing property to money's worth. That is precisely what the proof shows in this case appellant did with appellee's tools, machinery and lumber. It took them, used and wore them out and so made them equivalent to money.

But we understand that a tort may be waived and the injured party may sue in assumpsit and recover the value of his property wrongfully taken from him without reference to what the wrong-doers may have done with the property. And it was so held in *F. W. & W. R. W. Co. v. Chew*, 67 Ill. 376; 2 Greenleaf, Ev., Sec. 108, and note 3; *Putnam v. Wise*, 1 Hill, 234; *Lightly v. Conston*, 1 Taunton, 112.

It is insisted by appellant that the jury erred in not allowing appellant pay for finishing the work which appellee agreed to do under his contract. The proof shows that the

floor was not laid for the stand-pipe and pumping station and some work about the well, which was finished by the city, after appellee left the work. There is also a claim made that the work on the stand-pipe was so changed, that appellant ought to have a credit. The proof is clear that all these claims, if allowed, would not exceed the sum of \$400, which amount was remitted from the verdict by appellee, thereby curing any error against appellant in respect to those items.

It is again urged that the court erred in giving instructions for plaintiff and in refusing instructions for the defendant.

We shall not discuss these objections in detail. We have carefully examined the instructions given and refused and we have been unable to find any such error in any of them as to call for a reversal of the judgment. While some of the instructions given for the plaintiff may be open to verbal criticism and lacking in technical accuracy in all respects, still they were not such omissions as were likely to mislead the jury. The instructions taken as a whole considered together we think fairly and correctly declared the law to the jury. Indeed, the instructions given on behalf of the defendant were fully as favorable for it as the law would bear. Courts will not and ought not reverse judgments for trifling and unimportant errors occurring in the progress of the trial or in instructions which have not misled the jury and do not affect the real merits of the case.

Finally and lastly it is urged as a ground of reversal that the court erred in permitting appellee to remit \$400 of the verdict and thus meet the views of the court and avoid a new trial.

We can hardly think counsel serious in this objection. The verdict was amply supported by the evidence before the *remittitur* and it was done in the interest of appellant and if it was error, appellant can not complain of it.

After a careful study of this long record, and a consideration of all the objections urged, we have been unable to find any substantial error in the record, and the judgment will be affirmed. The additional abstract furnished by appellee we regard as unnecessary and it will be taxed to the appellee.

Judgment affirmed.

HORACE HIGGINS, EXECUTOR,

V.

MARY A. SPRING.

Administration—Claims—Limitations—Evidence—Instructions.

1. In an action against an executor for services rendered his testatrix during her sickness, this court declines to interfere with the verdict for plaintiff.

2. An action against an executor for services rendered his testatrix, who died before the expiration of the time limited for the commencement thereof, may be commenced after the expiration of that time and one year after the issuing of letters testamentary.

3. Refusal to give an instruction for defendant is not error, where the same instruction has in substance been given for plaintiff.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

MESSRS. BOTSFORD & WAYNE and GEORGE W. BROWN, for appellant.

MR. J. F. SNYDER, for appellee.

LACEY, J. On the 3d day of November, 1886, Elizabeth Woodard died, leaving a will appointing appellant executor therein. December 20th, the will was admitted to probate and on the 10th of January, 1887, the appellee filed her claim against the estate for \$325, being an amount claimed for 130 weeks' services in caring for deceased during her sickness, and doing work for her. Judgment was given against the estate in favor of appellee for the full amount of the claim, and on trial before a jury in the Circuit Court, the appellee obtained a verdict also for the full amount, upon which verdict the court rendered judgment. From such judgment this appeal is taken. The causes assigned for error are that the

Higgins v. Spring.

verdict was against the weight of the evidence, and the improper modification of certain of the appellant's instructions, and the refusal to give appellant's instruction No. 5. We will first notice the question as to whether there is sufficient evidence to support the verdict. It appears that the appellee was a niece of the deceased, and during the time the services were claimed to have been rendered, for which she filed her claim, she lived with her father, Gilbert Higgins, brother of deceased, who lived near by. We have made a careful examination of the evidence, and find the appellee's claim is supported by the testimony of five witnesses, who testify that during a large portion of the last five years of deceased's life, the appellee took care of her in her sickness, especially during the night time, and some of them swear that deceased was sick all the time and had a tumor in her side, and throat trouble. The evidence also tends to show that the services were worth from \$3.50 to \$30 per week. It would appear that if the appellee's witnesses were believed there was abundant evidence to support the verdict; and besides, the declaration of the deceased was shown, to the effect that she would pay appellee well for her services, thus showing that they were not understood by deceased to have been gratuitous, as is claimed by appellant.

It is true that the appellee's evidence was somewhat contradicted by appellant's witnesses and that there was a conflict in the evidence. This being so, it was the province of the jury to reconcile it if it could, and to determine which side had the preponderance. We do not think that the verdict of the jury is so against the weight of the evidence that we would be authorized to set it aside for that reason.

The next question is, was the modification of the appellant's instruction No. 3, error. One of the modifications has reference to the statute of limitations, directing the jury in effect that the statute ceased to run after the death of deceased until the claim was filed, it being less than one year from the granting of letters testamentary. This was in effect also given to the jury in appellee's first instruction. We find no error in this. As to the statute of limitations the jury was

properly instructed, the undisputed facts of the case being considered. Sec. 19, Chap. 83, R. S., provides that "if a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executor or administrator after the expiration of that time and one year after the issuing of letters testamentary or of administration. Except for the above statute about three months of the first part of the five years immediately preceding the death of deceased, November 3, 1886, would have been barred for the reason the claim was not filed for about three months after the deceased's death. By the death of Mrs. Woodard the statute of limitations was suspended from that time and for one year from the granting of the letters testamentary. It will be seen then that there is no error in the instruction as modified.

The other modification complained of was cured by the special verdict of the jury.

The jury found by their verdict that the term of service for which they gave a verdict was 130 weeks at \$2.50 per week, so that the appellant was not injured by the refusal of the court to instruct the jury that appellee would be restricted in her recovery to \$2.50 per week, even if such were the law, a point we need not determine. There was no material error committed in the refusal of the court to give the appellant's fifth instruction offered, regarding the manner of estimating the testimony of witnesses. The same was given in substance in the appellee's second instruction, and it was not necessary for the court to repeat it; but even if none had been given we would not deem it sufficient error for reversal.

Perceiving no error in the record the judgment is affirmed.

Judgment affirmed.

ORLANDO DAVIDSON
v.
JOHN J. CLARK AND BYRON CLARK.

*Contracts—Manufacture of Machines—Breach—Principal and Agent—
Estoppel—Evidence—Instructions.*

1. Where a person contracts for the manufacture and purchase of machines, and his agent, who is the patentee of the machine and is familiar with the material and workmanship required, superintends their manufacture and accepts them, the buyer is estopped to deny that they were properly made.
2. If such agent recommends a workman as a proper person to work on the machines the manufacturers are not responsible for his want of skill.
3. In this case it is held that the instructions were not erroneous in giving undue prominence to certain portions of the facts.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. BOTSFORD & WAYNE, for appellant.

Messrs. SHERWOOD & JONES, for appellees.

LACEY, J. The appellant and appellees entered into a contract May 20, 1887, by which the latter agreed with the former to build for him fifty McCullum potato diggers for \$40 per machine, the appellant to pay \$1,000 down and the balance when the machines were finished. Appellees agreed to build them with first class material and in a workmanlike manner and paint with two coats of paint and deliver the machines at the depot at South Elgin, when ordered, free of charge. In pursuance to the agreement the appellant paid the first payment down, and during the summer and fall of 1887 the appellees manufactured and delivered the greater portion of the machines as agreed, which were accepted by the appellant through his agent, McCullum, the patentee of the machine.

Afterward \$400 in addition to the first payment was paid, leaving a balance due on the contract as claimed of \$600, together with some extras amounting to \$127.01. The appellant, on the trial of the case, resisted recovery on the alleged ground that the appellees had failed to comply with the contract in the manufacturing of the machines, in that the workmanship and material failed to fill the contract. The cause was tried by a jury and resulted in a verdict for the balance claimed and interest, amounting to \$779.91, on which judgment was rendered by the court and from which this appeal is taken. The main point of the complaint here is, that the verdict is manifestly against the weight of the evidence, and that in addition, some of the appellant's instructions were erroneous. The appellees insisted before the jury that, 1st, the machines in material and workmanship were in accordance with the contract; 2d, that the material was such as was directed by McCullum, the agent of appellant, and the mixing of the iron was done by the man who had performed the same service for appellant and McCullum the year before, by the name of Johnson, and who was recommended to appellees by McCullum; 3d, that as to the workmanship, McCullum was present the most of the time overseeing the work, and put a good many of the machines together himself, and finally inspected and accepted the machines, and appellant is estopped from now insisting that the machines are not according to contract. The evidence tends to show that the machines were of first class material and the workmanship in like manner. We think, however, as an original question, the greater weight of the evidence is, that there was a failure on the part of appellees to some extent in those particulars, though hardly so decided as to require reversal merely on that ground after allowing the advantages a party obtains by the verdict of a jury. But the stronger point in appellees' case is the action taken by McCullum, as the evidence quite strongly tends to show he recommended and directed the kind of iron to be used and also the man to mix it and do the casting.

It also appears that he was at least four-fifths of the time putting the machines together and would not wait till they

Davidson v. Clark.

were done. All the machines were delivered at the depot, except some twelve or thirteen left at the shop.

When it is considered that McCullum was the patentee of the machine and had previously manufactured them, and was an expert judge of the proper material to use and the kind of workmanship required, and that he directed in a great measure everything, and the fact of his acceptance of so large a portion of the machines, we believe the jury were justified in finding that there was an acceptance with full knowledge, and that the appellant was estopped from going back and insisting that the machines thus accepted were not in accordance with the contract.

The appellant also complains of the action of the court in giving appellees' third, fourth, fifth and sixth instructions, because not supported by the evidence, and that they make prominent certain portions of the facts, giving a one-sided view to the case in favor of appellees.

The third instruction in substance is, that if McCullum, with appellant's knowledge and consent, directed the kind of material to be used, and superintended the construction of the machines, and that they were constructed according to his order, then the appellees should not be held responsible for defective material.

The fourth that if McCullum as the appellant's agent requested the appellees to employ Johnson as their moulder, and to have charge of the castings, etc., and he was employed at such request, and McCullum recommended him as a competent man to do the work, that this was a guarantee on appellant's part that he was a competent man, and appellant was estopped to claim that he did his work improperly or inefficiently, or claiming damages for reason of his want of skill. Fifth instruction is that if McCullum, as agent, etc., without appellees' consent interfered with the construction of the machine by reason of which the machines were improperly put together without appellees' fault, then appellees were not barred of recovery of the contract price, if the machine failed to work on account of such interference and the material was first class. The sixth instruction is that though

there were defects in the machine and workmanship, yet if the jury believed from the evidence that such defects could with reasonable prudence have been seen by the defendant or his agent, and that the defendant or his agent had sufficient opportunity to examine such machines before accepting the same, then it was the duty of defendant or his agent to have rejected said machines or to have called the attention of the plaintiffs to such defects and given them an opportunity to correct the same; therefore, if the jury believe from the evidence that defendant or his agent accepted said machines in a defective condition, or, having sufficient opportunity to know that they were defective in workmanship or material, without giving plaintiffs opportunity to correct the same, then defendant is estopped from now setting up said defects as a defense to this action, and plaintiffs are entitled to recover whatever the evidence may show to be due them under the contract.

We see no error in those instructions. They bear upon important points in the case and there is evidence on which to base them; they do not improperly direct the minds of the jury to any particular evidence in the case, but simply important circumstances which are claimed by appellees to have been established by the evidence, which, if established, fix certain rights under the contract.

We think the court did not err in giving them.

These are the substantial objections raised by appellant's counsel against the verdict and which are insisted on as cause for reversal. We do not deem them sufficient and therefore affirm the judgment.

Judgment affirmed.

36	316
43	543

WILLIAM A. MCGILLIS AND JAMES HOGAN

v.

H. GALE. 1

Agency—Evidence—Instructions.

1. In an action on a due bill, it is held that the evidence was sufficient to warrant the findings that the person who issued it had authority as defend-

McGillis v. Gale.

ants' agent to do so, and that defendants afterward ratified its execution, and that there was no error in the giving or refusing of instructions.

2. Unless all the instructions given for appellants are contained in the abstract, this court will presume that their refused instructions were properly refused.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. EDWARD E. DAY, for appellants.

Mr. H. K. WHEELER, for appellee.

LACEY, J. This was a suit brought in the Circuit Court on a due bill issued to appellee by appellants, as is claimed by their agent, L. R. Taylor, for \$365.57, dated November 18, 1882, reciting that it was given for supplies and labor on the I. L. & I. R. R. during the month of November. The appellants put the execution of the due bill in issue by a plea of *non est factum* sworn to. It was claimed and insisted on in the court below by the appellants, that Taylor had no authority to execute the due bill, and as to the account for work and labor done by and furnished for appellants as contractors, on said railroad, they plead the five years statute of limitations. The main question in this case is, as to whether Taylor had authority in the first instance to execute the instrument sued on, and whether, secondly, they ratified the execution of the note subsequently. It appears that appellants had a sub-contract on the railroad, mentioned in the due bill, under the Western Air Line Construction Co., and that they employed a large number of men to do the work, and among others, the appellee. While appellants were building the road across her land she boarded the workmen for appellants and furnished teams to help do the work. She was directed by McGillis, that if she wanted anything to facilitate the boarding of the hands to send order to Taylor, and she got an order subsequently from Taylor to get lumber. After appellants had suspended work, appellee's husband went to Momence to get the pay, and there found Taylor at a little house near the

Miller Hotel drawing due bills for labor and work, and settling up with a large number of appellants' employes for their work and labor. Taylor was appellants' bookkeeper. McGillis testifies that Taylor's general duties were to keep the time for the men, make pay rolls and keep private accounts, and he commenced about one week from the time appellants commenced work. It appears that at this settlement with the men, Taylor issued due bills to a large number of others the same as he did to appellee, and that large amounts of them have been recognized and paid by the appellants; and Alfred Gale, the husband of appellee, testified, that at an interview with McGillis, one of the appellants, not long after the due bill was issued, showed it to him, and that McGillis promised to pay it. This, however, the latter denies. We think, at least, that it was a fair question for the jury, whether the witness Gale testified to the truth or McGillis. It was also a fair question for the jury to determine whether, under all the evidence in the case, the bookkeeper, Taylor, had original authority to execute the due bill; also whether, if such authority was wanting, whether or not appellant subsequently ratified it. After an examination of the evidence, we are satisfied that there was abundant evidence from which the jury might rightfully find both these issues for the appellee.

The giving of the plaintiff's instructions is complained of, but we think there can be no valid objection to any of them. They appear to submit the question at issue fairly to the jury. The appellants also insist that the court erred in refusing appellants' refused instructions Nos. 1 and 2. We have examined them and are of the opinion that they were properly refused; besides, those given for appellants are not abstracted, and we are unable to tell, even if the refused instruction were proper, whether the court did not embody the same principles in others given for appellants. It is the duty of the court to so hold if those given are not abstracted. The rules of this court require that all the instructions given as well as refused, shall be abstracted.

Seeing no error in the record the judgment is affirmed.

Judgment affirmed.

Harrison v. The People.

JAMES HARRISON

v.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL.

Municipal Corporations—Officers—Village Trustees—Wilful Neglect of Duty—Special Election—Quo Warranto—Instructions.

1. In *quo warranto* to determine the right to an office, an instruction that the wilful absence of relator and failure to perform the duties of his office would amount to a resignation, is properly refused if it contains no declaration as to the length of time of such absence.

2. Where a member of the board of trustees of a village wilfully absents himself from the meetings of the board, and neglects to perform the duties of his office for a period of eight months, he will be deemed to have resigned his office, and it may be filled by special election upon order of the remaining members of the board.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Ogle County; the Hon. WM. BROWN, Judge, presiding.

Messrs. O'BRIEN & O'BRIEN, for appellant.

Messrs. HATHAWAY & BAXTER, for appellees.

C. B. SMITH, J. This was a proceeding begun in the Ogle County Circuit Court in the nature of a *quo warranto*, on the relation of Hiram A. Fogleman, alleging that James Harrison, appellant, had intruded himself into and usurped the office of village trustee in the village of Creston in Ogle county. At the same time this suit was begun against appellant, John A. McCrea commenced a like proceeding against another person charging him with like usurpation, and Daniel Dimon commenced a third suit of the same kind against still a third man charging him with also intruding into the office of village trustee of said village of Creston.

It appears from the record that these cases all involved precisely the same state of facts or so nearly so that there was

no legal or material difference, and by consent of parties, they were all tried together. On a hearing the court gave judgment of ouster against the respondents, and thereupon appellant excepted to the judgment and now brings the case here on appeal and asks for a reversal. It was stipulated that but one of the three cases should be appealed, and that the other two should abide the judgment of the court on appeal in this case.

The facts are these: At the regular April election for village trustees for the village of Creston, the relator, Hiram A. Fogleman, was duly and lawfully elected one of the trustees of said village, and thereafter the full board was duly organized with seven members, composed of J. C. Spriggs, president, William C. Agnew, Henry Buss, Wm. J. Metler, John A. McCrea, Daniel Dimon and Hiram A. Fogleman. The regular meetings of the board were fixed on the first Tuesday of each month, in a building known as the "Observer" office. Everything went well until the 10th of August; on that night there was a regular meeting of all the members of the board for the transaction of whatever business should come before them. At this meeting a bill was presented by Reuben Heisnor for lumber furnished by him for building sidewalks in the village. A motion was made to allow the bill by some member of the board, and that an order issue for its payment, but objection was made to the allowance of the order on the ground, as alleged, that Heisnor was a mere "go-between" between the village treasury and the firm of J. A. McCrea & Co., from whom the lumber in fact came; and the bill was furnished and made out to Heisnor, simply because J. A. McCrea, being a member of the board and a member of the lumber firm, could not directly furnish the lumber to the village by reason of the prohibition of Sections 3 and 4, Chapter 102 of the Statute, entitled, "Officers." This was the only ground of objection to the allowance of the bill. The motion was then put and voted upon, and trustees Dimon, McCrea and Fogleman all voted for allowing the bill, and Buss, Agnew and Metler all voted against allowing the bill, which resulted in a tie, and thereupon the president, J.

C. Spriggs, voted against allowing the bill, and so the bill was rejected. After the rejection of this bill, trustees McCrea, Dimon and Fogleman, who voted together to allow the bill, did not attend another meeting of the board until the evening of November 6th, although there had been regular meetings of the board on every evening of the regular meeting, besides several attempts to have special meetings so that the business of the village could be transacted, but at all these meetings McCrea, Dimon and Fogleman absented themselves. On the evening of November 6th it appears that Agnew was out of town, and could not attend the board, and on that evening these three long missing trustees found it to suit their joint convenience to attend, and after the board had transacted some business, and a motion was made and declared carried by the president to adjourn, one of these three men moved to take up and allow this Heisnor lumber bill, which had been rejected on the 10th of August previous. The president declared this motion out of order and stated that the counsel had adjourned and refused to put the motion. Then these men again absented themselves from the board and never again appeared until after their offices had been declared vacant and their successors elected by order of the remaining members of the board.

Some time after this November meeting the following notice was served on Fogleman, the appellant, viz.:

“To H. A. FOGLEMAN, Esq.:

“You are hereby notified to attend a regular adjourned meeting of the president and board of trustees of the Village of Creston, to be held at the office of the Creston Observer, in the Village of Creston, on the 26th of December, 1888, at the hour of seven and one-half o'clock P. M., and perform the duties of your office as trustee of said village, or show cause why your said office should not be declared vacant.

“J. C. SPRIGGS,
“President.”

On the evening fixed for this meeting it occurred that the proprietor of the “Observer” office had gone out of town or

was absent, and the place locked up, so that the room could not be occupied; but the four members went to the place at the time of meeting and stayed there about three-quarters of an hour, at the door, waiting for the delinquents to come; but they failed to respond to the notice, and the remainder of the board then got another room near by, and met and declared the office of the three absent members vacant, and ordered a special election to be held in January to fill the vacancies. That election was regularly and lawfully held, and James Harrison, the respondent, was duly elected. It is admitted that this special election was in all respects regular. At the regular meeting in February, when Harrison appeared to take the oath and enter upon his duties, then, for the first time (with the single exception of November 6th) since August 10th, the relator appears and claims his seat. Here is a period of about eight months that this relator wholly neglected and refused to attend the meetings of the board and transact the business of the people, for which he had been elected, and by his confederation with his two associates prevented a quorum and absolutely blocked the transaction of any and all business. We are satisfied, from the proof in this case, that his motive in absenting himself was to compel his associates on the board to allow an alleged illegal lumber bill, amounting to \$10. Appellee seeks to explain his absence by saying he was in Kansas twice during that summer. Of course that would be a valid excuse for the time he was absent from his home; but that absence, giving it all the weight it is entitled to, is not a sufficient excuse for his long continued abandonment of his office and public duties. The proof satisfies us that he, McCrea and Dimon were acting in concert and collusion to prevent the transaction of any business until they could enforce the payment of the alleged illegal lumber bill.

On the night of December 26th, when appellee was notified to appear at the council room and attend his public duties, he swears that he went to the place of meeting and found the door locked and then went directly across the street into Dimon's store where he could see the office; the other members went there and stood on the sidewalk until long past the

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time for meeting, waiting for the delinquents. He himself admits on oath that he said he would not attend the council meetings unless McCrea and Dimon went also, and assigns as a reason for not going, that if he went he would be insulted. It is also testified by another witness and not denied by Dimon, that he, Dimon, said, "I put up that lumber job."

In *The People ex rel. v. Hanifan*, 6 App. Ct. Rep. 158, it was held that when one wilfully absents himself from attending upon the duties of his office in a village or city council for a period of five months, that he will be deemed to have resigned his office, and that the vacancy may be filled by special election upon order of the remaining members of the board.

The respondent submitted to and requested the court to hold as law the following propositions:

"1st. It is the law that if the relator, without just cause or excuse, absented himself from the regular and adjourned meeting of the board of trustees, of which he was a member, he impliedly resigned his office as such trustee. (*Refused.*)"

"2d. If, in consequence of the failure of the relator and other co-trustees to attend the regular and adjourned meetings of the board of trustees, wilfully and without just cause or excuse, after having received notice to attend a meeting of said board and perform the duties of their office, or show cause why their office should not be declared vacant, said board was without a quorum, that it is the law that the trustees Metler, Buss and Agnew, together with J. C. Spriggs, as president of said board, or any one or more of them as such trustees and president, had the power and authority to declare the office of the relator, as such trustee, vacant, and call a special election to fill such vacancy. (*Refused.*)"

But the court refused to hold these propositions as law. We think both these propositions were rightfully refused as they both lacked any declaration as to the time of the wilful absence, which would amount to a resignation of the office. They were both wanting in that element and were properly refused as mere naked propositions of law.

It would not be strictly accurate to say, as a proposition of

law, that any and all acts of wilful absenteeism from the meetings of a board of trustees, without any reference to the time of such wilful absence, would amount to a resignation. The absence must be so long continued as to justify the legal presumption of abandonment; and the time necessary to raise such presumption must be a mixed question of law and fact to be determined from the circumstances of each case. While both of the above propositions might have been held as the law under the particular facts in proof in this case, still, for the reason above stated, there was no error in refusing them.

But we think the finding of the court was manifestly against the clear weight of the evidence, and for that error the judgment is reversed and remanded.

Reversed and remanded.

IRA METTLER

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Cutting Trees—Indictment—Evidence.

1. An indictment for cutting trees on the land of another under Sec. 325 of the Criminal Code, which charges the offense in the language of the statute, is sufficiently specific without describing the land, and containing the words "then and there."

2. On indictment for cutting trees on land belonging to a corporation which could only give consent to such cutting by resolution passed at a meeting of its officers, evidence of the verbal consent of some of the officers is inadmissible.

3. On indictment for an act prohibited by statute, defendant's testimony as to his motive in committing the act is properly rejected.

4. Sec. 1, Laws 1885, relating to cemeteries and making it a crime to cut trees therein, does not, by implication, repeal Sec. 325 of the Criminal Code, in so far as it also provides a punishment for such an act.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Ogle County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Mettler v. The People.

Messrs. O'BRIEN & O'BRIEN, for plaintiff in error.

Messrs. D. W. BAXTER, State's Attorney, and M. D. HATHAWAY, for defendants in error.

Per Curiam. This is a prosecution under Section 325 of the Criminal Code, which makes it an offense for any person, without color of title made in good faith, who shall knowingly and wilfully cut, box, fell, bore or destroy any tree or sapling standing or growing upon the land of another, without the consent of the owner, or, if the land belongs to the State school land, canal land, or belongs to any association or corporation, without the consent of the proper authorities or persons having legal charge thereof, shall be fined not less than three dollars nor more than \$200.

The indictment was drawn under this section and the appellant tried and found guilty and fined \$100.

He was charged in the trial court, in the count upon which he was found guilty, in the language of the statute, of cutting, felling and destroying ten oak trees thus standing on the ground of the Dement Cemetery Company Association, organized under the laws of Illinois for lawful purposes, without the consent of the lawful authorities of the said Dement Cemetery Association, and without the consent of the person having the legal charge thereof.

It is claimed that the indictment is not specific enough in not describing the land and in not containing the words, "then and there," but we think the indictment, being in the language of the statute and according to the approved precedents, is good.

It is objected the court improperly allowed appellant to show that he had conversations with two of the trustees, and that they gave him verbal authority to cut the trees.

This would not have been competent; such authority could not have been given except by a legal resolution passed at some meeting of the officers.

The offer to prove that the cutting of the trees was of advantage and that they were not ornamental, was properly refused. Appellant had advantage of showing what the offi-

cers said to him about cutting the trees in the evidence as given.

His testimony as to his motive was properly rejected.

The criminal intent is inferred from the doing the act prohibited by the statute, no matter what his actual motives were, provided it was not justified under the statute and the act was done knowing it was in the cemetery ground.

It is insisted that the statute under which this prosecution was had was repealed by implication by the laws of 1885, Sec. 1, regarding cemeteries. We think not. This act provides for the punishment of a large variety of acts, which it makes a crime, among which is the cutting of trees, but does not repeal by express words the old statute.

Under the old statute it can not be doubted that the act here complained of would have constituted a crime and we think the new act did not repeal it. Repeals of former statutes by implication is not favored. *Butz v. Kerr*, 123 Ill. 659.

Two acts may prescribe different punishments for the same act. *Wragg v. Penn Tp.*, 94 Ill. 11.

The record, as amended, shows that the grand jurors named in the record were properly selected and sworn on the first day of the August term, 1889. We think the record is quite free from error and the conviction just. The plaintiff in error being one of the board of the cemetery association, without any authority from the board, wilfully cut from the cemetery ground certain shade trees for the purpose of procuring wood for his own use, regardless of the wishes of the board.

We can scarcely conceive of a more reprehensible act, and the defendant, plaintiff in error, justly merited all the punishment he received.

The indictment is good even under the act of 1885, rejecting as surplusage so much as was necessary to make it good under the old act and the punishment is consistent with the act of 1885.

There being no error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE CHICAGO, BURLINGTON & NORTHERN RAILROAD
COMPANY

V.

ADDISON H. HAWK.

36	327
48	328
36	327
138	37

Railroads—Personal Injuries—Negligence—Evidence—Practice.

1. In an action against a railroad company for personal injuries, it is held that the evidence showed negligence on plaintiff's part, and none on the part of defendant.

2. In such action plaintiff can not recover upon any proof of negligence other than such as is charged in his declaration.

3. An agreement, in consideration of a free pass over a railroad, that the company shall not be liable in case of personal injuries, except for gross negligence, is binding on the passenger.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Carroll County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Mr. JAMES SHAW, for appellant.

Mr. GEO. L. HOFFMAN, for appellee.

C. B. SMITH, J. This is an action on the case, and comes here on appeal by appellant, from a judgment of the Circuit Court of Carroll County. The material facts involved in this suit as disclosed by this record are these: Appellant owns and operates its road from St. Paul to Oregon in Ogle county, and from Oregon it runs its trains of cars over the Chicago & Iowa Railroad Co. to Aurora. At Aurora all its trains are stopped and broken up and cars to go farther eastward and to Chicago are taken into custody by the Chicago, Burlington & Quincy Railroad Co. under some kind of a running arrangement with that road. The Burlington & Northern has nothing further to do with the cars or the stock after it is delivered to the C., B. & Q. Road, and both cars and stock

pass under the exclusive control of the C., B. & Q. Road. But, notwithstanding this arrangement, appellant issues through shipping bills to Chicago and gives its shippers, when in company with stock, free passes subject to certain regulations as to the amount of stock and the number of persons allowed to go with it under a free pass.

Appellee, Addison H. Hawk, lived at Chadwick on the line of appellant's road, and was, and had been for some time, a dealer and shipper in stock over appellant's road, and was familiar with the methods, rules and mode of shipment on appellant's road.

On the 7th day of September, 1887, appellee shipped one car load of hogs from Chadwick to Chicago over appellant's road and had them billed for Chicago in the usual and customary shipping contract of appellant's road. His own name was indorsed on the back of this contract as being entitled to pass free, in accompanying his stock to Chicago.

Two other shippers, Mr. Bishop and Mr. Wakefield, also had stock for the same train, and they, in company with appellee, with their stock, started for Aurora and reached there some time after dark. As soon as the train reached Aurora, appellee, Mr. Bishop and Mr. Wakefield left the caboose and train and went to a neighboring restaurant to get a lunch, and while they were at lunch, the train passed into the custody of the C., B. & Q. Road and was at once broken up by the switch engines in the yard, and the cars distributed to their proper places, and for their proper destinations in the trains then being made up by the C., B. & Q. in its own yard. Appellee's stock was put in a train made up to go to Chicago that night, and was to and did leave Aurora about 9:30 p. m. The yards in Aurora are extensive and consist of a great many tracks, and are more or less covered with cars and trains being made up for different points, with several switch engines constantly at work, shifting a great many cars from train to train.

After appellee and his companions had eaten their lunch, they went in search of the caboose and train upon which they were to continue their journey to Chicago. Not knowing

where the caboose or train could be found, or where it would start from, they walked up among the tracks in the yard, where they observed a switch engine at work moving cars about from place to place, and among these cars which were being moved about by this engine was a caboose. Appellee swears they saw a man moving about in the yard with a lantern, apparently taking the number of cars, and that they asked him where the train or car was which was to take the C., B. & N. stock to Chicago, and that the man then pointed out "that caboose down there with the engine attached to it;" and that thereupon they went to this caboose intending to get into it. Appellee then said to his companions, "We will go up to the caboose; there are too many engines switching around here; we will get hurt." Appellee and Wakefield got upon one end and Bishop on the other, but they found no light in the caboose and the doors locked, and no person in charge of it except the engineer, who had hold of one end of it with his engine, switching it about with other cars, and bumping it against other cars in the manner usual to switching cars. Appellee and his companions made no inquiry of the engineer or fireman about the caboose when they found it dark and unoccupied, but kept their places in the ends of the caboose while it was being thus hauled about by the engine. Appellee testifies that while so on the caboose he was sitting on the guard rail with his face to the door of the coach, holding to the iron ladder, and his feet hanging down, resting on the floor of the platform of the car. He was holding to the ladder, as he says, to brace himself, not thinking of any accident, and talking. While in this position the moving cars came into contact with other cars, causing the car he was on to rebound, and that from such bump and rebound of the car he lost his balance and that his feet were thrown backward over the end of the platform, and that one of his feet was caught between the shoulder of the draw-bar and the wooden crane upon which the platform rests, and when the cars again came together his great toe was so mashed that it had to be amputated that night. The injury was not regarded at that time as being very serious or liable to result in a permanent injury

to appellee, but the wound refused to heal, and the injury resulted very disastrously to the health of appellee, and involved him in great suffering for a long time.

There are five counts in the declaration. They are not substantially different. The *gravamen* of the charge in all these counts is, that it was the duty of the defendant to have the caboose opened a sufficient length of time before the departure of the train for Chicago, so that appellee could board and enter the said "last mentioned caboose" before the train would start toward Chicago, and that the defendant was guilty of negligence in not opening the doors of this caboose upon which appellee was hurt, a sufficient length of time before the departure of the train, so that appellee might have gone inside and taken a seat. No other negligence is charged against the company, or relied upon on the trial.

The defendant pleaded not guilty, and upon a trial before the jury, the appellee obtained a verdict for \$6,000. Appellant moved for a new trial, which the court overruled and gave judgment to the plaintiff upon the verdict, to which appellant excepted, and now brings the case here on appeal, assigns numerous errors, and asks for a reversal of the judgment.

In the view we take of this case it will not be necessary to notice all the assignments of error relied upon for a reversal.

First, as to the negligence charged in the declaration, it appears from the proof that the caboose upon which appellee was hurt was not the caboose upon which he was to be taken to Chicago, but that on the contrary the caboose on which he was hurt belonged to a gravel train, which had just come into the yards from the Fox River Branch of the C., B. & Q. Road and was to be taken to its proper place in the yards as soon as the tracks could be cleared for it to get out. Those in charge of it had locked it up for the night and gone home. The caboose which was to go to Chicago on the stock train was in another part of the yard and upon another track some distance away, and was in fact open a sufficient length of time before the train departed to enable those who went on that train to get in the caboose and be ready when the train

started. There was no negligence in the company in not opening the caboose upon which appellee was injured, for that caboose was not to be further used that night. Appellee had no right to get in it, even if it had been open, and if he could have entered it he would not have gone to Chicago in it. It must be borne in mind that there is no negligence charged in not opening the caboose which was in fact intended to go to Chicago, and which did go, and which was in fact open. But even if the right caboose had not been open in time it did appellee no harm, for he was not there, and was not for that reason prevented from getting in; nor was it because the right caboose was not open that he was hurt. There is therefore a total variance between the proof and the declaration, and an entire failure to prove the negligence alleged in the declaration, or any one count of it. Nor is it any answer to this objection to say that appellee was wrongfully directed to this car by some servant in the employ of the defendant; for there is no allegation of any negligence in that respect in the declaration. Appellee must recover, if at all, upon the negligence charged in the declaration, and not upon something not charged and of which defendant has had no notice.

Second. It is again insisted that inasmuch as appellee was riding upon a free pass under an agreement that the company should not be liable to him except for gross negligence in case of injury, that he can not recover.

That portion of the contract upon which appellee shipped his stock and upon which he was riding, relating to the pass is as follows:

"It is also agreed * * * that the persons who receive free transportation in charge of said stock, in consideration of the receipt of the same, agree to assume all risk of personal injuries from any cause whatever, except injuries arising from the gross carelessness of the railroad company.

Signed:

"THE CHICAGO, BURLINGTON AND NORTHERN RAILROAD,
"By W. H. Ott, Agent."

"A. H. Hawk, shipper."

Across the face of the above shipping contract was stamped

in red letters the following sentence: "*Read this contract.*"

On the back of this shipping contract was the following statement, viz.:

"Parties actually in charge of and accompanying the within named stock must write their own names here in ink."

Signed: "A. H. HAWK."

It will be seen from the above that the shipping bill and its provisions became to all intents and purposes a contract duly signed by both parties; and since there is no complaint by appellee that he did not fully understand its terms and conditions, or that it was not fairly, freely and intelligently entered into, we assume that it was so fairly entered into and understood by appellee when he signed it and bound himself to its terms. In consideration of the pass by which he saves himself the expense of his ride to Chicago he agrees to release the company for all damages which may happen to him on that trip except such as are caused by the gross negligence of appellant. That railroads and common carriers may now contract for exemption from all negligence except that which is gross has been so often decided by the Supreme Court of this State, that that question must, so far as this court is concerned, be regarded as settled law. *Arnold v. I. C. R. R. Co.*, 83 Ill. 273; *I. C. R. R. Co. v. Reed*, 37 Ill. 484; *I. C. R. R. Co. v. Morrison*, 19 Ill. 136; *Western Trans. Co. v. Newhall*, 24 Ill. 466. With the propriety or justice of this rule we can have nothing to do. It is our duty to follow and apply the law as laid down by the highest judicial tribunal of the State.

Does the proof in this case show, then, that the defendant or any of its servants were guilty of gross negligence? We have searched this record in vain for any such evidence. What are the plain uncontradicted facts in this cause, furnished by appellee himself, which were the immediate cause of appellee's injury? Simply this: He and his companions chose to go up in this yard in the dark and hunt up the caboose for themselves, and then casually finding a man numbering cars, who informs them that the caboose pointed out was the one to take the C., B. & N. stock to Chicago,

upon approaching the caboose they find it locked and dark, hitched to a switch engine, and being thrown about in the yard in the connection with the other cars. Without asking the engineer any questions as to what he was doing with this caboose or where it was to go, they got on it and stayed there, occupying a position full of danger to themselves, without any knowledge on the part of the engineer that appellee or any one else was there. Wakefield and Bishop, who were riding with him, say there was nothing unusual or out of the usual order in the switching and that there was no unusual bumping or jamming cars together. So far as the switching the cars about was concerned, there is no proof of any kind of negligence on the part of the engineer. There is no proof of any duty or practice on the part of the company to send a guide with shippers to inform them where to find the train or caboose, and we know of no law which makes it the duty of a railroad company to keep a guard or watch over those who ride on any kind of a train, to prevent them from losing the train. To impose such a rule on a railroad company, would be most unreasonable and impracticable; there is no hardship in requiring travelers to keep themselves informed as to the time and place of departure of trains. This information can usually be had at the company's office. In this case appellee sought no person nor any information at the office or depot, where he would be most likely to get correct information as to the location of the train he must take. The person whom he met in the yard who informed him that he supposed the caboose then being switched around and pointed out to him was his caboose, gave him no direction or advice to get on to it, while it was being thrown about and jammed against other cars, not open or lighted. At the utmost, that man, whoever he was, or whatever may have been his duty, only made a mistake in pointing out the wrong caboose; he gave appellee no advice or encouragement to board that train while it was being switched about or to stand on the platform of the car until it was opened; his information was not the proximate cause of the accident.

Plaintiff himself swears that he voluntarily got on this car

and staid on there, knowing it was locked, thinking it was a safer place than on the ground among the tracks. He thus himself acquits every one of any agency in inducing him to get onto that car before it was open, and assigns as a reason for his so doing that he regarded it a safer place than on the ground, where he supposed himself in danger of being run over, and where he had voluntarily gone without any agency on the part of defendant or any wrongful or negligent act on the part of any of defendant's servants. After a most careful and attentive study of this record we are unable to find where the defendant was guilty of any negligence, or lacking in the discharge of any duty it owed to appellee, much less of any gross negligence.

On the contrary, the proof shows that appellee's injury was occasioned by his own want of attention and care for his own safety. In addition to the facts and circumstances attending and leading to the injury, as disclosed by appellee himself, there is the testimony of three other witnesses testifying to the admission of appellee made at the time or on the same night of the injury, as to how it happened, in response to questions asked him by those who were taking care of him and assisting him after he was hurt, and at a time when he himself thought his injuries were not of very serious or permanent character.

John Kearns swears that he was a watchman at a street crossing within three or four rods of where Mr. Hawk was hurt, and that he went to him in three or four minutes and asked him how it happened and that appellee replied "it was my own foolishness," or "carelessness. I put my foot back and got it ketched in the draft-iron." W. J. Amy, the nurse at the hospital where Mr. Hawk was taken after the injury, testified to having a conversation with him on his arrival at the hospital: "I said, 'this is too bad; how did it happen?' 'Well,' he says, 'my own carelessness; I was talking with the gentleman and got my foot caught.' He said he was leaning back against the railing and got his foot caught in the bumpers. This was before his toe was amputated."

Dr. C. L. Smith, the attending surgeon, who amputated

appellee's toe and dressed the wound, swears, that in his conversation with appellee on that occasion, appellee said (as near as witness could remember) "something to the effect that he was standing on the platform with his foot hanging over the end of the car, and in some way got caught by the bumpers."

Appellee was recalled to testify in response to these alleged admissions made by him to these three witnesses. He says: "I had no conversation that I know of with Mr. Kearns at all; have no recollection of stating that I put my foot back foolishly; I have no recollection of making such statement to him or the yardmaster. As to the conversation that Dr. Smith swore to, I have no recollection of it now. I would not swear that it was not true. He helped me downstairs next morning, and we had a conversation, but what it was I don't know. Mr. Amy was there when Dr. Smith was there; did not say to him that I had my foot hanging over the end of the car. My best recollection is it is not true—his statement was not true; but I would not swear it was not."

Giving to appellee's denial all the force that can be fairly claimed for it, it amounts only to a statement that he does not remember of making the admissions, and does not believe he made them, but that he will not swear he did not make them. This kind of negative testimony from a single interested witness, can not fairly be held sufficient to overcome the positive declarations of three, apparently fair, intelligent and wholly disinterested witnesses, swearing that appellee did make the statements charged to him.

After a careful and attentive study of this record we are unable to find where the defendant was guilty of any negligence, and much less of any gross negligence; but, on the contrary, the proof shows clearly that appellee's injury was occasioned by his own want of that reasonable degree of care which the law requires every man to exercise for his own safety.

For the reason that this record fails to show any cause of action against the defendant, the judgment will be reversed but not remanded.

Judgment reversed.

CHARLES N. HAZEN

v.

HOLLIS JOHNSON, BY HIS NEXT FRIEND.

Practice—Evidence.

Where the assignment of error is that the verdict was against the evidence and instructions, and no complaint is made of the giving or refusal of instructions, and the evidence was such as to warrant the verdict, the judgment will be affirmed.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Stark County; the Hon. S. S. PAGE, Judge, presiding.

Mr. M. SHALLENBERGER, for appellant.

Mr. G. C. VAN OSDEL, for appellee.

UPTON, P. J. This suit was originally commenced before a justice of the peace, from whose finding an appeal was taken to the Circuit Court of Stark County, wherein a trial was had before a jury, resulting in a verdict and judgment for the appellee, from which an appeal was taken to this court.

The appellant was in possession and the owner of a colt, which, upon being driven to harness, manifested a vicious disposition, and under excitement was inclined to kick. The appellee had some experience in handling, breaking and training colts and horses. It was agreed between the parties that appellee should take the colt of appellant and break it, so that it would ride, work and drive well in single or double harness, for which services, when completed, appellant was to pay appellee \$10. As to this contract, to the extent stated, there is no controversy.

It was claimed by the appellant that appellee expressly warranted the full and complete performance of the contract, without injury to the colt, beyond what should be absolutely

Hazen v. Johnson.

indispensable, and that, if appellee did not fulfill the contract, he was not to have any compensation whatever for what labor he might have performed in the attempt. It was further claimed by appellant that the colt was permanently injured by appellee in his endeavor to break or subdue it, and that he wholly failed to perform his contract in any particular.

On the other hand, appellee claimed that he had fully performed his contract in every particular, without injury to the colt; that when he returned it to appellant it was in good condition, uninjured, and would ride and drive in double or single harness, gently and quietly, and was well and perfectly broken; that upon its return to appellant, it was turned out in the pasture and not used for a period of many months, and when taken up and put to use was improperly handled and treated by appellant, which improper treatment and neglect in use by appellant was the sole cause of its renewed vicious habits. Upon this contention there was a sharp conflict in the evidence before the jury in the trial court.

The only point to which our attention is directed, and the one upon which is sought a reversal of the judgment in the court below, is that the verdict of the jury was against the evidence and instructions of the court, and that, therefore, a new trial should have been awarded by the trial court.

No complaint is made of the giving or refusal of instructions in the court below. We have carefully examined the testimony in the record before us, and we can not say that the jury were not warranted in the verdict rendered, and they were far better able to judge of its weight than we can be, and under the well established rules of law applicable to cases of this character, we must sustain that finding.

Finding no reversible error in this record the judgment of the Circuit Court is affirmed.

Judgment affirmed.

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56 126

KINGMAN & COMPANY

V.

JOHN MANN ET AL.

Practice—Process—Defective Service—Jurisdiction—Vacation of Judgment.

1. Service of process on one as agent of defendant, who is not in fact its agent, but who mails it a copy of the summons, without the officer's return thereon, with notice that suit has been commenced, is not such service as can give the court jurisdiction.

2. Nor is the sufficiency of the service helped by the fact that plaintiff's attorney wrote to defendant informing it of the suit.

3. In the case at bar this court suggests the mode of procedure on vacation of a judgment obtained without proper service of process.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. STEVENS & HORTON and WILLIAM POTTER, for appellant.

Mr. H. K. WHEELER, for appellees.

UPRON, P. J. The bill in this case was filed by the appellant, a corporation created and existing under the laws of this State, having its place of business and location in Peoria, against the appellees, who were residents of Kankakee, in the county of Kankakee, to enjoin perpetually a judgment at law, obtained by the appellees against the appellant under the following circumstances, briefly stated.

Appellant was engaged in the agricultural implement business, at Peoria, in 1886, and had been so engaged for some years prior thereto, and was the agent, for this State, of Russell & Co., manufacturers of traction engines, for the handling and sale thereof.

It had, in the year 1886, a traveling agent, engaged in

selling machines and taking orders for articles manufactured by Russell & Co., whose name was G. J. Ferguson.

At the time above stated P. B. Olmstead was engaged in business on his own account at Kankakee, and dealing in agricultural implements also. In the month of July of that year, Ferguson called upon Olmstead and made inquiry if he knew of any persons in that vicinity desirous of purchasing traction engines, and proposed to pay Olmstead to assist him in finding purchasers, or a purchaser therefor. Olmstead, knowing that the appellees desired to purchase a traction engine, agreed to go with, introduce, aid and assist Ferguson in selling appellees the engine at the price of \$1,100, being the regular price, for which service Ferguson was to pay Olmstead \$25. This was the only employment or service ever done or performed by Olmstead for or on account of any transaction in which Kingman & Co. were interested, as he testifies. On the 22d of July, 1886, Ferguson, with the assistance of Olmstead, took an order from (appellees) Mann for a traction engine of ten-horse power, etc. By this order the appellees directed the machine and attachments to be shipped in care of P. B. Olmstead, Kankakee, Ill. Appellees agreed to receive the engine, etc., subject to the conditions named in the contract, and pay the charges thereon from the factory, and agreed to pay upon delivery the sum of \$1,100, viz., by note, due December 1, 1887, \$383; note, due December 1, 1888, \$383; note, due December 1, 1889, \$334, all with interest from July 15, 1886, at seven per cent.

The Manns received the machine with all the attachments as stipulated, and executed their notes to the appellant pursuant to their agreement. On the day of receiving the engine, for some reason, it was claimed by appellees, the pump of the engine did not work well; a telegram was sent to appellant by appellees, of the following tenor: "Send a man to fix engine; pump failed; at once; answer." Upon the receipt of this appellant sent immediately in answer to the telegram a machinist, named Ritzel, to fix the pump and run the engine. No further complaint was made of any defect in construction or use of the engine, or its attachments, until the 31st of

August, 1886, when a telegram from appellees was received by appellant, viz: "Pump played; must be fixed at once; answer." Appellant immediately ordered by wire a new pump from the factory of Russell & Co., which was obtained as quickly as possible, placed upon the engine, as is claimed, in a few days, without charge to the appellees. Appellees kept the machine and used it with the attachments, from thence until the hearing below, without further complaint to appellant.

About the time of the maturity of the first note given for the purchase of the engine, a claim was made by the appellees for alleged damages, which it was claimed they had sustained by reason of the delay of a number of days occasioned by the failure of the pump first put upon the engine, as above stated, and the delay consequent upon replacing the same with a new one.

The note not being paid, a judgment was entered thereon by virtue of a power of attorney thereto attached, and execution against the appellees upon that judgment was sent to Kankakee for collection, and was paid by appellees.

Soon thereafter a suit was commenced against the appellant by the appellees, Manns, in the Circuit Court of Kankakee County to the April term thereof, claiming damages therein in the sum of \$1,000.

The summons in this suit appellees caused to be served upon P. B. Olmstead, and upon this summons the sheriff of Kankakee county made the following return:

"I have served the within writ by delivering a true copy to Perry B. Olmstead, an agent of Kingman & Co., a corporation of the State of Illinois, the president of said company not being found in my county this 20th day of July, 1888."

At the time of making the service, the sheriff having the summons was told by Olmstead that he was not the agent of Kingman & Co., and had never been such agent. The service was directed to be made by appellees or their attorneys. Olmstead soon after wrote to appellant, stating that the appellees had begun a suit against them, and inclosed a copy of summons left with him, but without any return of the officer thereon.

Kingman & Co. v. Mann.

Whether this letter with its inclosure was in fact received by the appellant does not appear, but the attorney of appellees wrote to appellant that the suit was commenced.

The case was continued to the September term of the court, and no one appearing for appellant, it was tried by a jury, and resulted in a verdict and judgment against appellant for \$633.75.

Appellant, as it claims, was not informed of this judgment until after the adjournment of the court, and was therefore prevented from taking any action therein, relying, as it insists, of right, upon the total want of service of process upon it, and a total want of jurisdiction in the court to render any judgment against it in that case.

Appellees threatening to enforce that judgment by execution, appellant filed its bill enjoining its collection, averring therein, in effect, as hereinbefore stated, and that it was not legally or equitably indebted to the appellees (Manns) at any time, or in any sum whatever. The Manns, appellees, answered, which was a traverse of appellant's bill, to which replication was filed, and upon hearing before the chancellor resulted in a decree for the appellees (Manns), and the bill was dismissed with damages at eight per cent. To which decree appellant excepted, prayed an appeal, and the case is before us for review.

We think it clear that Olmstead, upon whom service was had in the suit at law, was not the agent—in law or in fact—at the time of making the attempted service in this suit of the appellant; and the evidence tends strongly to show, as it seems to us, that the appellees knew that fact.

We are also of the opinion that the appellant, Kingman & Co., is not chargeable with negligence in not making a defense to the suit at law. If it be true that the copy of the summons was sent by Olmstead to the appellant, and by it in fact received, that alone would not be notice of anything to require action by the appellant, much less to authorize a judgment against it, for there is no pretense that this copy of summons, if sent, contained any copy of the officer's return thereon, or notice of any pretended service thereof.

It will hardly be contended, we think, that simply leaving a copy of a summons in a suit at law with a third person, who is in no manner connected with, interested in, or liable for, any judgment which may be rendered in such suit, would constitute any legal notice of the pendency of such suit, or sufficient to require action by the adverse party in regard thereto, or to charge such adverse party with legal negligence in failing or neglecting to act. Nor would it be of any avail that the attorney of the appellees had written to appellant that suit had been commenced against them in that behalf.

We are of the opinion under the circumstances shown by this record that appellant, knowing it had no agent in Kankakee county, and that under the statute no service of process could be had upon it in that county, was justified in ignoring the fact (if it was brought to the knowledge of its officers) that a suit had been brought against it in that county. A suit without service of process, or the possibility of service as provided by law, could not harm appellant in any manner, nor without such service could the Circuit Court take jurisdiction to render any judgment against the appellant.

The damages in the suit at law, as claimed by appellees (Manns), were for the alleged loss of thirty days time in August, 1886, on account of the pump to the engine being out of order as above stated.

The evidence is not full or clear upon this subject of the want of equity in the judgment at law, yet the claim for so large damages caused by so short delay seems, on its face, extraordinary, and to us manifests a strong probability of its being, in part at least, unjust and inequitable, and as the question preliminary to opening the judgment at all must first be determined, and decided for or against the appellant, it was not necessary upon this preliminary question to inquire into the equity of the judgment at all, nor was it needful to take the evidence in full upon that question.

If the right to open up the judgment at all had been determined in the appellant's favor, the proper practice, it seems to us, would have been for the court to refer the cause to the master, to take the evidence and report upon the question of

Singer & Co. v. Lidwinsky.

the justice and equity of the judgment in the suit at law, as well as the proper amount thereof to which appellees would be entitled, if anything, or for the chancellor to form an issue in chancery, and submit that issue to a jury to aid the court in its determination upon that question of fact.

This being so, it was not requisite to have taken on that preliminary hearing the evidence in full on that issue of the judgment that would result from the reference.

The decree will therefore be reversed and the cause remanded, with directions to the court below to refer the case to a master, to take and report the proofs and the amount equitably due appellees, if anything, or upon issue made, refer that issue to a jury, as in like cases of chancery practice, for which purpose the decree of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

A. L. SINGER & COMPANY

V.

SAMUEL LIDWINSKY.

Attachment—Fraud—Evidence—Instructions.

In attachment for the price of goods sold, it is held, that the instructions given, while some of them might have been more guarded in expression, were not as a series, erroneous; that defendant was not guilty of fraud in purchasing the goods from plaintiffs, or in his manner of disposing of them; and that newly discovered evidence insisted upon for a new trial was not sufficient.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Peoria County; the
Hon. S. S. PAGE, Judge, presiding.

Messrs. H. C. FULLER and M. A. FULLER, for appellants.

Mr. GEO. B. FOSTER, for appellee.

UPTON, P. J. This was an attachment proceeding by the appellants against the appellee, brought to recover \$515, due appellants for goods sold to appellee in the summer of 1888.

The attachment was levied on December 22, 1888. On the same day an assignment in due form was made by the appellee to Ernest Feiffer, as assignee, for the benefit of creditors, but this deed of assignment was not placed of record until after the levy of appellants' attachment upon appellee's goods and possession thereof was taken thereunder.

In the attachment proceedings the assignee, Feiffer, interposed an interplea, but subsequently withdrew it, and issue was taken upon the affidavit filed for the attachment.

The grounds for the attachment, set out in the affidavit and relied upon to sustain the same, were that the defendant therein (appellee) had, within two years prior to the issuing of the writ, fraudulently conveyed and assigned his effects, or a part thereof, so as to hinder and delay his creditors, and that he had also within that time fraudulently concealed or disposed of his property so as to hinder and delay his creditors, etc.

A trial was had upon the issues thus joined, in the Circuit Court, by a jury.

Verdict was returned finding for the appellee on the attachment issue, but upon the issue of the indebtedness found for the appellants in the sum of \$527.90; and, after motion for a new trial had been overruled, judgment was entered on the verdict, from which an appeal was taken to this court, and the errors assigned, which are relied on for reversal upon argument before us, are :

1st. That the trial court gave improper instructions for the defendant to the jury.

2d. That the court erred in refusing appellants a new trial, and because,

3d. The verdict and judgment are contrary to the law and the evidence.

First. We have carefully read the several instructions given in this case for both the appellants and the appellee, as well as those given by the court on its own motion, and while

it may be true that some one or more of them might have been more guarded in expression, still we do not think they violate any principle of law, and, taken as a series together, we are unable to say that they did not state the law fairly, or that they are, taken as a series, erroneous, as applied to the facts of this case shown by the record before us.

Second. The motion for a new trial, which was overruled by the trial court, was based upon all three of the grounds above stated, one of which is already disposed of, and the other two are so closely connected that they may be considered together without confusion.

The question of fraud is so largely a question of fact, and so peculiarly one for the jury, that upon that question, if it was fairly submitted to them, we should hesitate to disturb their finding, unless it was quite apparent that such finding was the result of prejudice or passion, or manifestly against the weight of the evidence in the case.

It is claimed in appellants' arguments that the appellee made purchases of goods and merchandise aggregating, in June and July, 1888, over the sum of \$17,000, upon which payment was not due until December or January following such purchases, and that none of the bills were paid.

But it appears that the appellants had been for many years prior to 1888 engaged in mercantile pursuits in the city of Peoria, at which city both appellants and appellee resided and conducted business, but the volume of appellee's annual business, whether large or small, is not shown, nor does it appear, save by a vague inference (by referring to the fact in argument) that the amount of the purchases in June and July, 1888, of which complaint is made, was unusual or unnecessary in quantity to the business he was then conducting, or that the time of credit was unusual or unbusiness-like in the conduct of such mercantile pursuits, while the non-payment of that indebtedness is completely answered, without fraudulent implication, by appellants' attachment, and consequent general assignment for the benefit of creditors of the appellee, and before the maturity in great part of that indebtedness; and such assignment for such purpose, at the time and

under the circumstances, certainly can not be regarded as fraudulent.

It is further insisted that the appellee, at and during the time of making such purchases, was shipping goods and merchandise to his brother, Simon Lidwinsky, who was at the time conducting mercantile business, in a small way, in Delavan, Wis., and that such shipments of goods were fraudulent. The fact appears in evidence to be that appellee had, for several years prior to 1888, been in the habit of supplying his brother, who had been a peddler in a small way, with goods and merchandise. That in the year 1888 he sold his brother, in the regular way, goods to the amount of two or three thousand dollars in value; that those goods were entered upon the books of appellee by the clerk acting as his bookkeeper the same as all other goods sold; that there was nothing unusual about it; that for some of the goods so sold notes of his brother were given, which appellee assigned in payment of his own debts for money he had borrowed in conducting his business, and nothing appears but all the goods sold the brother were paid for. We can not say, from the evidence in this record, that the jury were not warranted in finding such sales made in good faith and without fraudulent purpose or intent.

It is further insisted that the trial court erred in not granting a new trial for newly discovered evidence; but that evidence, as set out, is not of a conclusive character or sufficient, as we think, to warrant us in the granting a new trial in the case. Nor does it sufficiently appear but that the appellants might, by the use of reasonable diligence, have discovered the claimed new testimony in time for hearing in the trial of the cause; and it was only cumulative, at most.

What has been said already disposes of the errors assigned or refused in the argument before us, and after a careful examination of the record, in view of the arguments of the counsel, we can not say that the trial court committed error in refusing a new trial, or that the jury were not warranted from the evidence in finding the verdict rendered in the case, or that such verdict, finding and judgment were so far erroneous as to warrant us in its reversal, and it must therefore be affirmed.

Judgment affirmed.

Colburn v. Wescott.

WILLIAM COLBURN

v.

C. M. WESCOTT.

Contracts—Performance—Evidence.

In an action on a contract for sinking a well, in which plaintiff agreed that the well should furnish sufficient water to admit of steady pumping, and should be fitted complete with pump, which defendant claimed was not done, this court declines to interfere with a verdict for plaintiff.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Woodford County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. EDWARDS & EVANS, for appellant.

Mr. W. L. ELLWOOD, for appellee.

LACEY, J. This suit was brought by appellee on the following contract, to wit:

“Entered into this day, Sept. 2, 1887, wherein in consideration of one dollar and fifty cents per foot (counting from top of pump to bottom of screen), C. M. Wescott is to furnish Wm. Colburn a two-inch tubular well, fitted complete, said well to furnish sufficient water to admit of steady pumping, work to be completed as soon as possible; Wm. Colburn is to furnish sufficient water to operate drills, also one horse and power, and board men. If cylinder will work and is wanted, it will be furnished in place of valves. If valves, head and cylinder are not wanted, a reduction of seventy-five cents per foot will be made, in not to exceed thirty feet of said well.” The above contract was signed by both parties. The declaration alleged performance of said contract on the part of the said appellee, in that in October, 1887, he bored and furnished complete, with pump and galvanized pipe, a two-inch

tubular well, one hundred and eighty-two feet from the top of the pump to the bottom of the screen, and averred that the well furnished sufficient water to admit of steady pumping, whereby the defendant became liable, etc. On the trial of the case the jury returned a verdict against the appellant and assessed appellee's damages at \$270. A motion for a new trial being overruled, the appellant brings the case to this court by appeal.

The only cause assigned for error is, that the verdict was against the weight of the evidence. The point insisted on for reversal is that the evidence fails to show one of two important facts: First, either the well was not furnished with sufficient water to admit of steady pumping, or he did not furnish him with such well, fitted complete with pump. It is strenuously and particularly insisted by counsel for appellant that there was not sufficient water to admit of steady pumping. The evidence on this point is somewhat conflicting. The appellee testified that after he had got the well down about 182 feet he struck a vein of sand water and that upon taking the drill up the water immediately rose to within 55 or 56 feet of the top of the well, while prior to this they had no water at all.

In sinking, they had a two-inch hole, inside of which they had a smaller tube, an inch in the clear; inside of that they had valves; when they struck water they worked a tool rod to clean it out. In that manner they can tell whether they have plenty of water or not. They shut off the water and then they can exhaust any supply, unless unlimited. After they struck water they pumped two days. When they first struck water they began to pump and threw an inch stream from the tube rod. They pumped with the tube rod that day, except at intervals, and also the next. It was operated by horse power. The second day they pumped an inch stream clear toward the last. They measured frequently and never found the water lower than 55 or 60 feet. Then they attached the pump and pipe proper except the pump head; at first it did not throw as large a stream as it did afterward on account of the cleaning up. After it was cleaned up it threw, ap-

pellant judges, about half an inch of clean water, according to his timing, one and a half gallons per minute. According to a catalogue shown appellant before putting down the pump, issued by the parties who manufactured the pump, it listed for a two-inch cylinder one and a half gallons per minute. They made quite a number of tests after the pump was in shape. Appellant's father was present, also Burger, the man appellee had helping him do the work, and neither held a watch when it threw less than a gallon and a half per minute. It filled a bucket holding about three gallons in about three minutes. This test was made without the head of the pump being on, but the same valves were used from the beginning. No tests were made while Colburn's father was present. After the test was made, Colburn said he wanted a larger stream than that. The appellee never heard any other objection from him than that. When they went back to put the new pump head on they found the well in bad condition. It would not pump. They found the water in the well as they had left it.

They raised the valve of the pump and put on new leathers and new head. It worked nicely then. It threw an inch stream then. The appellee does not think a two-inch tubular well will throw to exceed a half-inch stream. After the windmill head had come, they fixed the valves and put on the head and told Colburn, at noon, that they were ready to try the pump and well and turn it over to him, and he said he had no time and went to the field. Appellee finally went into the field after Colburn and got him to come in, and when he saw the well, appellee told him he was ready to turn it over to him and he said he would not accept it. Then appellee went home. Appellee was substantially corroborated by his hired man, Burger, and partially by Samuel Bilinger and Peter Roman. The appellee then produced the witness, Henry Ludwig, who examined the well in April, 1889, and took out the pipes and one-third of the way down they found water; the leather had been cut by the sand, and they put a new leather on the valves; could work it then but could raise no water.

"The only reason that I know why I could raise no water

was, something had got under the check and held it up so it would not hold water. This check is about two feet below the valve. If the check was kept open, the water would go down. Could not tell whether there was much water at the bottom of the well or not, as the pump was not used so we could tell how it would turn out." "I did not tell appellant the reason I could not get the water out, though he asked me." "I could not tell whether there was any water in the well or merely a pocket." "I think I raised water but the check valve failed to hold it."

On the part of appellant, he produced himself as a witness, who testified, he saw them using the horse power and it threw but little water, about one-fourth of an inch stream, coming in spurts, with a good deal of air and bubbles; watched them between three-quarters and half an hour. He tried the well after they left and there was no water scarcely. After appellee came back to put a new pump head on he came from the field to see the tests. They gave a few strokes and appellant a few, to the pump. It dribbled a little but did not make a stream of any size at all. It raised a very little water that evening by spurts; there was no stream, just dribbled a little and bubbles and air. There was no water to amount to anything. He tried the pump again next spring. He could not get any water at all; had tried it several times off and on but could get none. Never undertook to take the pump and valves before Ludwig. Since then, Bishop has taken it out and examined it. They found it in good shape. At time appellee and Burger were present it took twelve to thirteen minutes to get a wooden pail full of water.

The appellant was corroborated by his father, Richard Colburn.

John Marble, who is acquainted with suction pumps, tried the well about four weeks after appellee quit but could get no water; was of the opinion that there was no water. Lafayette Russell tried it next spring and could get no water. Harry Bishop, a well-digger and borer, tried the pump about a year ago and could not get anything out of it. Took out the upper valve but not the lower. He then filled the pump

to the top. The water did not run away; the lower valve was shut all right. "I tried to pump at that time and could get no water." Put down the valve and tried it again and could not get water. It had a good suction; if there had been any water at bottom it surely must have pumped. Witness has had experience in water stratas. A water pocket is a hole filled with water from the size of a spittoon to the size of a house. There was somewhere about 60 feet in the pipe when we examined it last. The water stood 65 feet to the top of the ground before witness filled up the pipe. Jacob Cheever tried the well the same evening they claimed to have struck water and it took him half an hour to get a half bucket of water. He tried afterward to get water for the hogs but could not; could not get any the next day after they claimed to have struck water. Witness worked for appellant at the time. This was about the substance of all the testimony. Some other witnesses were introduced on the part of appellee, but they are not of great importance. The appellant's counsel insists that the evidence clearly shows that there was no supply of water; that it must have been a small pocket that the appellee struck, that became exhausted in a very short time, and hence the contract made by the appellee was not fulfilled; or, if this was not so, the pump was not in running order when appellee tendered the well to appellant.

As to the first point, we think that there was evidence from which the jury might reasonably find that there was plenty of water in the well, as, without question, the water raised to within 55 or 56 feet of the top, in the neighborhood of which it always stood, though appellant's counsel claims that it might have been held up in the pipe. The jury, however, has found differently, and we think they were justified in so doing. We think that the jury were also at liberty to find from the evidence that the pump was in good order and pumping water in quantities required by the contract at the time it was tendered to appellant and turned over to him by the appellee. "The evidence, it is true, is conflicting on this point, but the jury are the judges as to the weight of the evi-

dence. If the appellee and his witnesses are believed, then the well was furnishing sufficient water to admit of steady pumping, and that in quantities which such wells of that size could produce.

It is very seldom that this court will interfere to set aside the verdict of a jury where the evidence is conflicting, as it is here. It has the right to judge as to the credibility of witnesses and to determine the weight to be given to circumstances, and, unless there appears to be a manifest lack of judgment, the verdict is final.

We think, in this case, especially, as this is the second verdict found in favor of appellee, the verdict should not be disturbed. There is no other cause assigned for error, and as we overrule appellant's point as to the want of evidence, the judgment must be affirmed.

Judgment affirmed.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO
RAILROAD COMPANY

V.

AURELIA DUFRAIN.

Railroads—Personal Injuries—Negligence—Contributory Negligence—Instructions.

1. Where, in an action against a railroad company for personal injuries, the declaration alleges that plaintiff was thrown from defendant's train, an instruction that she can recover if she used reasonable care in alighting, is error.

2. In such action, evidence that plaintiff alighted from the train while it was in motion shows negligence on her part, and the use of ordinary care in alighting under such circumstances does not entitle her to recover.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kankakee County; the
Hon. N. J. PILLSBURY, Judge, presiding.

Mr. THOS. P. BONFIELD, for appellant.

The appellee was guilty of contributory negligence in alighting from the train while it was in motion, and can not recover. *Dougherty v. C., B. & Q. R. R.*, 86 Ill. 467; *Shearman & Redfield on Negligence*, 341; *Jeffersonville R. R. Co. v. Swift*, 22 Ind. 450; *Penn. R. R. v. Chappel*, 23 Pa. St. 147; *O. & M. R. R. v. Stratton*, 78 Ill. 88; *Ill. Cent. R. R. v. Slatton*, 54 Ill. 133; *C. & A. R. R. v. Randolph*, 53 Ill. 510; *Ill. Cent. v. Chambers*, 71 Ill. 519; *O. & M. R. R. v. Schiebe*, 44 Ill. 460.

The appellee was guilty of gross negligence in alighting from the train while it was in motion, and there was not and could not have been any wanton and wilful injury done to her to excuse gross negligence on her part. If she was guilty of gross negligence she could not recover unless the negligence of the defendant was wanton and wilful, of which there was no evidence. *I. C. Railroad v. Baches*, 55 Ill. 379; *Same v. Hammer*, 72 Ill. 352; *Same v. Hetherington*, 83 Ill. 510; *C., B. & Q. Railroad v. Lee*, 68 Ill. 576; *I. C. Railroad v. Godfrey*, 71 Ill. 500.

Messrs. B. F. GRAY and H. K. WHEELER, for appellee.

UPTON, P. J. On the 9th of July, 1888, in the early morning, appellee, her husband, son and daughter, took passage on a passenger train running upon appellant's railway, at Fowler Indiana, for transportation to Strawn, in Illinois. The train in which they took passage arrived at St. Anne at 4:20 A. M. of the same day. The appellee, in alighting from the train, was injured by a fall, and brings this suit to recover damages from the appellant for that injury, laying her damages at \$1,999.

The declaration filed in the case contains two counts, the first of which, after charging appellant with possessing and operating a railroad, alleges that appellee took passage in the cars running upon the railway of appellant as above stated, paying the fare of appellee therefor. That upon the arrival of the train at St. Anne, appellant did not give appellee sufficient

time to alight from the train, and in attempting to alight therefrom, she was thrown off the train and injured, while she was exercising due care in that regard.

The second or additional count charged that appellee took passage in appellant's passenger cars, at and to be transported to the points above stated, and that appellant did not allow appellee sufficient time to alight from the car in which she was transported, and because thereof she was hurt and received permanent injuries, etc.

To both counts the plea of not guilty was interposed. In the trial court the case was heard with a jury, who found the appellant guilty, and assessed appellee's damages at \$1,999, the amount she claimed in her declaration, upon which verdict, after overruling a motion for a new trial, the court entered judgment, to which appellant excepted and appealed to this court. The record on that appeal is now before us. The controverted facts are in narrow compass.

By the declaration it is claimed that appellee was injured by reason of the negligent act of appellant's agents and servants in starting the train suddenly, and with a "jerk," as she was attempting to alight therefrom, using due care, by means whereof she was thrown off the passenger car to the depot platform, and thereby sustained the injuries complained of; and that her injury was occasioned by appellant's servants in not stopping its passenger train, upon which she was a passenger, at the point of her destination, for a sufficient length of time to let off passengers with safety, as required by law.

Both positions, as above stated, were sharply contested on both sides.

The defense, in part, was based upon the theory and allegation that after the train had started from the depot at St. Anne, and had gone some eighty feet, and while the train was in motion, the appellee voluntarily attempted to alight from the train, and in so doing was injured, and that such conduct in attempting to get off the train, while in motion, was negligence *per se*, sufficient to defeat recovery, and cited *Dougherty v. C., B. & Q. Ry. Co.*, 86 Ill. 467, and cases cited; *Ohio & Min. Ry. Co. v. Stratton*, 78 Ill. 94, and cases cited, with many

other adjudicated cases in this State and elsewhere, which seem to fully sustain the doctrine contended for. The appellee's fourth given instruction, as shown by the amended record in appellee's briefs, tells the jury that if the appellee used reasonable diligence and ordinary care in alighting from the train, then she might recover, etc. This instruction was erroneous, for the reason, first, the charge in the declaration is, as we have seen, that she was thrown from the train; second, even if she used all the care she could in the act of alighting from the train, it was negligence in her to attempt to alight at all when the train was in motion, however carefully she might attempt it. This instruction took away from the jury one of the main questions in the defense, and allowed a recovery for a cause not alleged in the declaration. C., B. & Q. Ry. Co. v. Mehlack, 131 Ill. 61.

The instruction asked by the appellant in regard to its being negligence to jump off the moving train might properly have been given, as such act would defeat the cause of action stated in the declaration, to the extent, at least, of the averment that appellee was thrown off the car by a sudden jerking as averred. One instruction to that effect was in substance given; of this, however, it may not be important to make further comment, for strictly speaking it is a question of fact for the jury, although the Supreme Court say in the above cited case, *that* is a still controverted question.

We do not wish to be misunderstood as asserting that if, after appellee had gotten out upon the platform of the car in which she was being transported, in a proper and timely endeavor to alight therefrom, and by the motion of the car or train she was forced to jump off, the act under such circumstances would be negligence on her part to prevent a recovery for injuries sustained through negligence of the servants and agents of the appellant in causing her to jump off; in such case the act would not be voluntary and would be excusable.

In regard to the other refused or modified instructions we perceive no reversible error.

We need not notice the point made on the special findings, as the case will be submitted to another jury.

It was entirely proper, and in some part the court did allow appellant to show that the train was stopped a sufficient length of time to allow all the passengers using reasonable diligence to alight therefrom before starting again, as that was one of the principal issues in the case; full inquiry in regard thereto should have been allowed by the trial court.

For the reasons above assigned the judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with the views above expressed.

Reversed and remanded.

SAMUEL SHERMAN, EXECUTOR,

v.

D. E. SAYLOR.

Administration—Distribution—Bond Required from Legatees.

1. While a claim against an estate is pending for adjudication, it is improper to order money paid out to the legatees.

2. Whether such claim is *bona fide* can not be inquired into collaterally on petition of a legatee for distribution.

3. An order of distribution, directing the executor to pay out to each of the legatees an equal portion of the cash on hand, when there are standing in favor of some of the legatees notes against the estate, which the will provides shall be set off against the legacies to the holders thereof, is improper.

4. An order of distribution which requires an executor to pay legacies, before bond is given by the legatees to refund their proportion of any debt which may afterward appear against the estate, is erroneous.

5. Such bond is necessary, even where there are sufficient assets to satisfy all demands against the estate, as contemplated under Sec. 116, Chap. 3, R. S.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. C. P. BARNES, JOHN B. LYON and D. T. SMILEY, for appellant.

Sherman v. Saylor.

Messrs. JOSLYN & CASEY, for appellee.

LACEY, J. The appellee, one of the legatees, filed in the County Court his petition asking distribution of the estate, less than five months after the granting of the letters of administration, his petition seeking to compel the appellant, the executor of the last will and testament of Wealthy Sherman, deceased, to make distribution. The petition shows the appointment of executor of the estate on the 21st day of September, 1888, and the filing of the inventory by the executor on the 17th day of November of the same year, in the County Court, and published notice for claimants to appear before the said court on the first Monday in December, 1888; that no claims were presented against the said estate, and as petitioner believed that no claims existed against the said estate, that a large sum of money was in the hands of the executor, which was not needed in any way for the payment of debts, and could then be distributed in whole, or in part; and prayed that the appellant might be cited to make report of the estate, and make distribution in such way and manner as the said court might direct, without injury to said estate, which said petition was filed on the 10th day of February, 1889. A citation was issued and appellant responded, and on the 21st of February, 1889, filed his report, showing cash on hand of \$1,847.84, after deducting certain charges therein set forth. The report also showed that two suits, one against Susan Hanley and one against George and Anna Thomas, the first on a note for \$1,000, and one on a note for \$400, were pending and undecided in the Circuit Court, and that appellant had himself filed a claim against the estate for \$1,500, which he believed he was entitled to recover. The County Court dismissed the petition, from which the appellee took an appeal to the Circuit Court, where, upon a hearing, that court rendered the following order, to wit: That \$500 be paid out of the money on hand as reported to Clifford Sherman being a specific legacy, and the balance of the said amount in appellant's hands be distributed among the following heirs of said estate, to wit: To Elizabeth Wattles \$269.44; to Susan

Hanley the same; to D. E. Saylor, appellee, Ella Smith and Alma Thomas, the only heirs at law of Melissa Saylor, deceased, the same amount; or to each of them the sum of \$89.81; to Jeremiah Sherman \$269.44, and to Samuel Sherman the same amount; to which order the appellant excepted and brings the case to this court by appeal.

Objection is made by the appellant that the case was not properly before the court below for the action taken, and that the petitioner did not show his interest. We are inclined to think, however, that appellant is wrong in that contention. The petition was in proper form to give the County and the Circuit Courts jurisdiction to make the proper orders, and the evidence showed appellee to be one of the legatees. But we think the appellant is right in some of his other assignments of error. Inasmuch as there was a claim in appellant's favor pending for adjudication and undetermined, it was improper to order the money paid out to the legatees until such claim was adjudicated.

It is insisted on the part of the appellee that the claim of appellant was not filed and prosecuted for honest purposes but in order to prevent an order of distribution, and that the claim had been defeated in the County and Circuit Courts, and, that the case had been appealed to the Appellate Court. This all might turn out to be true and it might not. It might turn out in the end that it was not a void claim against the estate, and if such were the case a great wrong would be done in paying the legatees ahead of the appellant's claim. As to the fact of the good faith of the claim and its justice we can only say that those questions could not be adjudicated or inquired into collaterally on the hearing of the case on the appellee's petition, and the court had no jurisdiction to pass on its merits.

It is urged by the appellee that the suits for the collection of the notes above alluded to had been determined and judgment rendered on both notes; and even if it were otherwise it could have no bearing, as the makers of the notes, Susan Hanley and George and Alma Thomas were each, under the will, entitled to a legacy large enough to pay their respective

notes, and that the will directed the executor to apply the legacies to the payment of the notes; and it is insisted that it was the duty of the executor to apply the legacies to the payment of the notes and avoid involving the estate in unnecessary litigation. But this application could not and ought not to be made until it was ascertained whether there would be any debts; and then the order did not provide that such application might be made, but ordered the executor to pay to each of the legatees an equal portion out of the cash on hand, without reference to the uncollected notes against a portion of them. This order, besides being premature, was in express violation of the provisions of the will according to the statement of appellee in his brief as to its provisions. But even without such provisions of the will such order would have been erroneous in not properly protecting the rights of the estate against the legatees as respects its demands against them. The order made by the court is also in violation of the statute which provides that "Executors and administrators shall not be compelled to pay legatees or distributees till bond and security is given by such legatees or distributees, to refund the due proportion of any debt which may afterward appear against the estate and the costs attending the recovery thereof; such bond shall be made payable to such executor or administrator, and shall be for his indemnity and filed in court." Sec. 117, Chap. 3, Starr & C. Ill. Stats.

The appellee cites Section 116 of the same chapter, which reads as follows:

"Wherever it shall appear that there are sufficient assets to satisfy all demands against the estate, the court shall order the payment of all legacies mentioned in the will of the testator, these specific legacies being the first to be satisfied;" and insists that under it the order was authorized and regular. We do not so regard it. The two sections must be considered together; while the legacies may be ordered paid as provided for in the last section above cited, the bond must be given as provided for in the first section cited.

The case of *Reynolds v. The People*, 55 Ill. 328, in no way

contravenes the above view which we have taken of the meaning of the law. In that case, while the court held the order for distribution might be made before the expiration of one year, yet the bond was given in that case, or tendered, so that the question of giving a repayment bond was not involved.

We think the court below erred in the particulars above named in making the order complained of, and that the order of dismissal of the County Court should have been affirmed. The order of the Circuit Court is therefore reversed and the cause remanded.

Reversed and remanded.

HERMAN BERGER

V.

HENRY HOERNER.

Landlord and Tenant—Trade Fixtures—Time of Removal.

1. A bar counter and shelf placed in a building by the tenant for the purpose of conducting a saloon, and attached to the realty so that they can be removed without injury to the premises, are trade fixtures and do not pass with the realty.

2. What is a reasonable time within which trade fixtures should be removed is a question of fact for the jury under the instructions of the court.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding.

MR. CHARLES K. LADD, for appellant.

MESSRS. ECKELS & KYLE and ALFRED R. GREENWOOD, for appellee.

UPTON, P. J. This suit was begun in a justice court. The action was replevin. The property sought to be obtained thereby was a saloon bar counter and a back bar shelf, of the value of about \$25 in the aggregate. Appellee obtained a

Berger v. Hoerner.

judgment before the justice of the peace, and on appeal to the Circuit Court the case was heard with a jury, who, on hearing, rendered a verdict for the appellee, upon which judgment was entered and a further appeal was taken to this court, after overruling a motion for a new trial.

The errors complained of may be considered under two heads, viz.: 1st. The court erred in its instructions to the jury, and in admitting improper evidence. 2d. The verdict and judgment are not warranted by the evidence on the law of the case.

First. It is conceded that the articles in question belonged to and were the property of the appellee, Henry Hoerner; that Hoerner loaned them to Michael J. Murry, to use in a *saloon*, occupied by Murry as lessee, which saloon, when leased, had no furniture. The saloon building was leased to Murry by the owner thereof, one W. H. Miner. About one year after executing the lease, Miner sold the saloon building to Levi Watterman. Murry remained as his tenant for about one year, and at the expiration of that time sold out his effects, except the property in question, to Watterman. Watterman was informed that the property in question belonged to appellee, and was obtained of him by Murry in the manner before stated.

Appellant was the lessee and occupant of the saloon at the time of the suit brought, as tenant of Watterman. Demand was made for the articles in question of Berger before suit brought, and he was directed by Watterman not to deliver them to the appellee.

The counter was an old one, and kept in place by two iron braces attached to it, and nailed or screwed to the floor of the room. It had been moved several times and could be removed without difficulty or damage to the building. The shelf was 3 feet 4 inches long, of soft wood, attached by a nail or nails to the wainscoting, and could also be removed without damage to the building. These articles were placed in the saloon by the tenant for the purpose of his business or trade as a saloon keeper, and expressly to enable him to sell the beer manufactured by the appellee, and this was known to the owner of the building, his landlord.

As such trade fixtures the tenant had the right of removal thereof during the existence of his lease, or within a reasonable time after the expiration thereof. This rule of law is too well understood to require a citation of authorities in its support. In such case, even if attached to the building, such articles do not become fixtures as between landlord and tenant.

What was a reasonable time to remove the articles in question by the outgoing tenant or the tenants thereof, was a question of fact for the jury under the instructions of the court, in view of all the evidence and the circumstances proven in the case.

We feel impelled to hold that the evidence in this case, when considered in reference to the doctrine of fixtures, as stated in the elementary treatise upon this branch of the law, as well as the whole current of adjudicated cases in the courts of this State, clearly establish that the articles in question were of a temporary character, put up and placed in that saloon building by the tenant thereof, alone for the purpose of trade, and with no intention on the part of the landlord or the tenant that the same were so placed as a permanent attachment or accession to the freehold, and that such articles were therefore personal, and not real estate, and did not pass by the conveyance to Watterman.

In the late case of *Chapman v. Union Mutual Life Ins. Co.*, 4 Ill. App. 35, the rule is tersely stated as follows:

"Chattels become real estate when they are annexed to the freehold *under such circumstances* that it *clearly appears* from an inspection of the property itself, taking into consideration the character of the annexation, the nature and adaptation of the articles annexed to the uses and purposes of the freehold at the time the annexation was made, and the relation of the party making it to the freehold in question, that a *permanent accession was intended to be made by such annexation.*"

In cases of doubt *great weight* must be given to the actual or presumed *intention* of the parties enacting or placing the articles claimed as fixtures. *Doodey v. Crist*, 25 Ill. 551; *Kelley v. Austin*, 46 Ill. 156; *Ogden v. Stock*, 34 Ill. 522; *Otis v. May*, determined by this court May term, 1889, which

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was affirmed by the Supreme Court October, 1889; see also Ewell on Fixtures, Sec. 290, Landlord and Tenant; see also Calumet Iron and Steel Co. v. Lathrop, determined by this court opinion filed May term, 1890, and cases cited.

Further citations are deemed unnecessary. We find nothing in the instructions of the court which militates in the least against the views above expressed, but they are in entire harmony therewith, and we think the refused instructions were properly refused, and in the admission or exclusion of evidence no error was committed by the trial court.

Second. We have examined the evidence in the record with care, and we are fully satisfied that the jury were justified thereby in the verdict rendered, and that both the verdict and the judgment of the Circuit Court thereon, were fully warranted by the facts in the case and the law as applicable thereto, and that substantial justice has been done.

Perceiving no error in the record before us, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

RICHARD GOLDSBROUGH

V.

JOHN M. GABLE.

Landlord and Tenant—Lease under Seal—New Parol Lease—Estoppel—Evidence—Instructions.

1. Where one, holding under a lease under seal, holds over and pays the stipulated rent after his term expires, his tenancy is not by virtue of the original lease, and a new parol lease may be made.

2. Where one holds under a lease providing for monthly payments, an agreement to pay semi-monthly is sufficient consideration for a new lease for less rent.

3. Where a new lease is fully executed, while the lessee is in possession under a former lease, and money is paid in accordance with it, the lessor is estopped to avoid it.

4. Evidence in this case is held to establish the execution of a new lease.

36	363
39	279
36	363
140	200
36	363
49	557

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. McCULLOCH & McCULLOCH and SHEEN & LOVETT, for appellant.

Such a contract is void for these reasons:

First, it is without consideration. Appellee was in law bound to appellant for the rents as provided for in the lease at least until March, 1885. His promise to keep the premises and pay a lesser rent was therefore no consideration for the plaintiff to reduce the rate. A promise to do that which one is already bound to do is no consideration for a contract. *Loach v. Farnum*, 90 Ill. 368; *Miller v. Ridgeby*, 19 Ill. App. 306.

Second, such a contract can not rest in parol. The estate was created by deed. It can not be changed, although under certain circumstances it may be put an end to, by parol. *Loach v. Farnum*, *supra*; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Chapman v. McGrew*, 20 Ill. 101; *Hume v. Taylor*, 63 Ill. 43; *Barnett v. Barnes*, 73 Ill. 216; *Breher v. Reese*, 17 Ill. App. 545; *Conway v. Starkwealten*, 1 Denio, 113; *Schnuyler v. Smith*, 51 N. Y. 309; *Hemphill v. Flynn*, 2 Penn. St. 144; *Ames v. Schnesler*, 14 Ala. 600; *Crommelin v. Theiss & Co.*, 31 Ala. 412.

Messrs. GEORGE B. FOSTER and ISAAC C. EDWARDS, for appellee.

In support of appellant's position counsel lay a great deal of stress upon *Prickett v. Ritter*, 16 Ill. 96; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Webster v. Nichols*, 104 Ill. 160, and other cases. We do not deny but that all the foregoing decisions are good law, but insist that they do not apply to the case at bar. In each of the cases cited the tenant had held over without any new agreement as to terms or rent, and the court held that such holding over would be construed as an implied agreement on the part of the tenant that he was

holding upon the same terms as to rent and time of payment. But upon a careful examination of each of the cases it will be seen that such presumption or implication may be removed by the acts of one or both of the parties.

In the case of *Field v. Herrick*, 14 Ill. App. 187, the court say: "Now it is a general rule that where there is a lease for a year, and by the assent of both parties the tenant continues in possession afterward, *then, in the absence of any new agreement*, the law will imply a tacit renovation of the former one. * * * Where the lease is for any period less than a year, the holding will be construed as being for another term of the same length of time, and in all cases as upon the same terms as to the amount of rent and times of payment, unless there be some act of one or both of the parties to rebut such an implication." The learned judge in this case carefully reviews all of the authorities on this point, and broadly lays down the doctrine that the implication arising from holding over can be rebutted by the acts of one or both of the parties.

If the holding over is shown to be with the understanding between the parties that it should not operate as a renewal of the original lease, this will rebut the presumption arising by implication. *Quinlan v. Bonte*, 25 Ill. App. 240.

The legal presumption of a renewal of the tenancy arising from a holding over may be rebutted by proof of a different intention, but it must be shown that such different intention was participated in by both landlord and tenant. *Wolz v. Sanford*, 10 Ill. App. 136.

(The only other point seriously contended for by appellant's counsel is that the old lease being under seal, the subsequent verbal lease was void for want of a new consideration. Counsel seem to totally ignore the important fact that the old lease had expired by its own limitation, and that there was no holding over under it, and that the parties to the old lease and to this suit had, after the expiration of the old lease, made a new parol lease which had been fully executed by all parties to it before the commencement of this suit.

We contend that if the parties to the old lease had, during

the time for which the old lease was given and before its expiration, met and by parol agreed that Gable was to surrender the old lease and take a new one for the same premises, that such parol surrender would be good, although the original lease was in writing and under seal. *Baker v. Pratt*, 15 Ill. 568; *Allen v. Jaquish*, 21 Wend. R. 628; *Dearborn v. Cross et al.*, 7 Conn. R. 48; *McKenzie v. Lexington*, 4 Dana, 129.

If a lease under seal can be surrendered by parol, the courts will surely uphold a parol contract which was entered into after the expiration of the written lease by its own limitation, and fully executed by both parties.

We contend that where it is virtually agreed between the parties that a lease shall be surrendered, and a new one is thereupon made, and the landlord accepts the new lease, this will estop the landlord thereafter from denying the surrender of the first lease, notwithstanding it was in writing under seal and the agreement to surrender was verbal. *Dills v. Stobie et al.*, 81 Ill. 205.

LACEY, J. This was a suit brought by appellant against appellee to recover an alleged balance claimed to be due from appellee to him on a certain lease. The cause was tried before a jury and resulted in a verdict in favor of the appellee, and judgment was rendered against appellant for costs, from which judgment this appeal is taken.

The facts are these: the appellee rented from and of appellant a certain building and premises situate in Peoria, Ill., from March 18, 1883, to March 18, 1884, for \$840, payable in monthly installments of \$70 per month, payable on the 18th day of each and every month until the expiration of said term. The lease was in writing and under seal. The rent was regularly paid until the expiration of the term, and at the end of the term the appellee did not deliver up possession, but continued to occupy the building and paid the rent at the stipulated price until May 18, 1884.

Then it is claimed by the appellee that a new agreement was entered into between the parties, to the effect that the appellee should only pay \$50 per month, and that to be paid

semi-monthly. The latter continued in possession of the building from that time until the 18th day of October, 1888, when he delivered up the keys, the building having been consumed by fire between the 15th and 16th of the same month. There is a dispute as to whether such additional contract was made as to the change of the leasing. Upon this point the evidence is somewhat conflicting, the appellee testifying that such a contract was under negotiation from May 18, 1884, to July 9, 1884, and that at that date the changed terms of renting took place, and by the agreement, was to subsist from that time, as alleged, at \$50 per month, payable every two weeks.

The appellant testified that no change was ever made and that he never agreed to take \$50 per month for the use of the premises. Each had corroborating witnesses, but we think appellee was most strongly corroborated by direct evidence and largely so by the circumstantial. The fact, as it appears from the evidence, that appellee paid very regularly \$50 per month semi-monthly, and that the appellant accepted it till October, 1885, without objection, and that even after he had made objection, as he says, then he accepted the payments in the same way till the end of the lease, strongly corroborates the appellee. All the evidence considered, it makes the impression on our minds that there can not be much doubt that the changed contract was made as claimed by appellee. And the jury were abundantly justified in finding that such was the case and that the entire rent had been paid in cash, and by repairs on the building authorized by appellant and done by appellee, including at the rate of \$70 per month up to July 9, 1884, when the change in the terms of the renting is claimed to have taken place.

The appellant, however, insists that as a matter of law no such change in the terms of the renting as is alleged under the facts in the case, could have been effected. First, it is insisted that the lease being under seal and having been extended for another year by the appellee holding over and appellant accepting rent on the terms of the lease for two months after it expired, the contract could not be extended by intendment; that to do so would violate a rule of the

common law which prohibits an executory contract under seal from being changed by another contract of less dignity, *i. e.*, one not under seal; secondly, it is insisted that even if such could be done there was no consideration for the agreement and that it was therefore void. Some of the authorities cited in support are as follows: *Loach v. Farnum*, 90 Ill. 368; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151.

We will first consider the first point made. The rule that a contract under seal can not be changed by parol is a very harsh one, and was adopted a great while ago when the sentiments and habits of the people seemed to demand it. There may have been a reason for it at a time when men's names were signed by means of a waxen seal, and where a great majority even of the nobles could not read and write. But what good purpose can such a rule have now?

What great virtue can a mere scroll have when placed opposite to the signer's name, which the signature without would not have? And what good reason is there for saying that a simple contract in writing may be changed by a parol agreement, when one with a scroll may not? Our observations lead us to believe that the enforcement of such a rule has only a tendency to work injustice and create hardships, and seldom if ever promotes justice.

The very cases cited from our Supreme Court illustrate that fact. The Supreme Court, however, feels as stated in *Loach v. Farnum*, *supra*, that it has no power to change so ancient a rule, and refers it to the Legislature. We feel that the rule ought not to be extended to cases not strictly within its scope. It will be observed that the contract of leasing in question had expired when the supposed change was made and was not then executory. The expired contract is, properly speaking, not in force when a tenant holds over with the consent of the landlord. The new tenancy is one created by operation of law, and is in the nature of a parol agreement between the parties for a continuance of the tenancy another year on the exact terms of the old lease just expired. The old lease may be used as proof of what the agreement is, as implied by law, in connection with other facts, as often writings are used as

evidence to prove parts of a parol agreement. The seal, we imagine, has lost its mysterious force. A tenancy created by lease under seal may, by holding over and paying rent, ripen into a tenancy from year to year. In such case is it a tenancy existing by virtue of the original lease? we hold not. The original lease has only remote connection with it.

The leasing which we are considering, then, being of no higher grade than a strictly parol agreement at the time of the supposed change, it will be considered in that light. Suppose it be admitted that the new lease was one that could have been enforced for a year, we think the parties had a right at any time to change it by making different terms.

In this case the evidence tends to show that the new leasing was monthly, and the time of payment, instead of being every month, was to be every half month. We see no reason why parties can not change leases and make the terms different at any time. The agreement in this case to pay semi-monthly was a benefit to appellant and was a good consideration. If a man's conscience tells him that he is taking too much rent and he agrees to supersede the old lease by taking a new one with less rent for the future, it seems to us that this would be valid and based on a valid consideration. The rent to accrue, though less, would be a consideration. We think the following cases fully illustrate this: *Dunbar v. Burts*, 25 Ill. App. 240; *Wolz v. Sanford*, 10 Ill. App. 136; *Field v. Herrick*, 14 Ill. App. 187. Under this view of the law, the appellant got more favorable instructions than he was entitled to. We also think that the modification made by the court, that if the new contract was fully executed and the money paid in accordance with it, that such fact would create an estoppel against appellant from avoiding the contract, is supported by *White v. Walker*, 31 Ill. 422, and *Loach v. Farnum*, 90 Ill. 368.

We do not think the court erred in refusing the appellant's instruction No. 1. The evidence is very meagre to support it, and besides, the appellant apparently acquiesced in the payment of \$50 per month from October, 1885, to the end of the lease—at least there was evidence to that effect—and the

proposed instruction leaves this feature out of view, which, if proper at all, should not have been done. It was properly refused. We see no material error in refusing other of appellant's instructions. Finding no error in the record, and believing that full justice has been done, the judgment is affirmed.

Judgment affirmed.

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HAMPTON L. STORY AND ISAAC N. CAMP

v.

FRANK G. THOMPSON.

Actions — Limitations — Non-resident Defendant — Secs. 18 and 20, Chap. 83, R. S.

1. Where the payee of a note, made and payable in this State, is at the time the note becomes due, and continues a resident of this State, and the maker has always been and continues a non-resident, coming into the State occasionally on business only, the statute of limitations of this State does not run against an action on the note.

2. Sections 18 and 20, Chap. 83, R. S., construed.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Jo Daviess County; the Hon. JOHN T. CRABTREE, Judge, presiding.

Mr. E. L. BEDFORD, for appellants.

Mr. WILLIAM T. HODSON, for appellee.

LACEY, J. This was an action in assumpsit by appellants, based on several promissory notes executed by appellee and one O'Niel, who, at the time of giving them, were residents of Wisconsin, while appellants were residents of the State of Illinois. The notes bore date October 13, 1875, the first of them falling due in six months and the last in two years and three

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months from date, all payable in Galena, Ill., at the First National Bank. The appellants have continued to reside in Illinois ever since, and the appellee, Thompson, the only defendant, in Wisconsin. During this time the defendant, Thompson, was in the habit of coming into this State occasionally on business and again returning to Wisconsin when his business was completed. There were several pleas not necessary to notice, as the only defense relied on was the statute of limitations of the State of Wisconsin, set out in the fourth plea, of six years. It avers that the several causes of action mentioned in the declaration accrued in the State of Wisconsin, and the notes in question were executed and delivered to appellants at Hazel Green, Grant county, Wisconsin, and became due and payable there; that the defendant was then and always has been since, a resident of the State of Wisconsin; that by the laws of that State the action could have been brought within six years from the time the notes became due; that no action had been brought thereon in the courts of Wisconsin or elsewhere, within six years after said notes became due; wherefore no action could be brought in Wisconsin by reason of the lapse of time. The ten years statute of limitation of the State of Illinois, was also pleaded by the second plea.

To the second plea, the appellants filed their replication setting up that when the several causes of action in the first count of the declaration accrued, the defendant was out of the State of Illinois, to wit, at Hazel Green, Wisconsin, and there resided until the 24th of December, 1888 (date the summons was served), when the appellee returned into this State, and appellants on that day (within ten years after the appellee so returned to this State), appellee then being a resident of Wisconsin, aforesaid, and being found within the jurisdiction and territory of said Jo Daviess county, Ill., and said cause of action having accrued previously, while appellee so resided in Wisconsin, commenced action herein against appellee; and that appellants were residents of Illinois when said cause of action accrued.

The replication to the fourth plea avers that the cause of

action in the first count mentioned and also set forth in the fourth plea, did not arise and accrue in Wisconsin, as alleged, but accrued in Chicago, Cook county, Ill., where appellants then and ever since have resided and done business; and appellee, at the time when the action accrued in this State was, and still is a resident of Wisconsin; and on December 24, 1888, when suit commenced, appellee came and was found in, and duly served with summons, in said Jo Daviess county, as he might lawfully under the laws of Illinois, without this, that under the laws of Wisconsin, then and ever since in force, action could have been brought and maintained in Wisconsin, within six years, etc.

The appellee then filed a rejoinder to the replications, setting up that he was a resident of Wisconsin at the time the notes were given, but came into Illinois every week from that time to the present, and at each of the said times appellants could have served process on him; that the return to Illinois on December 24, 1888, as alleged, was not his first return into said State of Illinois; that at the time of service he came to Illinois to transact business and not to reside. Issue was taken on the replications and rejoinder, and a jury being waived the cause was tried by the court, resulting in a finding for appellee and judgment against the appellants for costs, from which judgment this appeal is taken.

The evidence was conflicting as to whether the notes were executed in Wisconsin or Illinois, but showed conclusively that appellants at the time of the giving of the notes, and ever since, resided and continued to reside in the State of Illinois up to the date of the service of the summons, December 24, 1888, and still resided there at the time of trial.

The appellee, as is shown by the evidence, at the time of the execution of the notes resided and has ever since resided in the State of Wisconsin, coming into this State occasionally on business, and returning to his residence in Wisconsin when his business was completed; but computing all the times together, had not been in this State ten years since the notes fell due, and before service of process on him.

The decision of this case involves the construction of Sections 18 and 20 of Chapter 83, R. S. These sections read as follows, viz.:

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"Sec. 18. If when the cause of action accrues against a person he is out of the State, the action may be commenced within the times herein limited, after his coming into or return to the State; and if after the cause of action accrued, he departs from and resides out of the State, the time of his absence is no part of the time limited for the commencement of this action. But the foregoing provisions of this section shall not apply to any case, when, at the time the cause of action accrued or shall accrue, neither the party against or in favor of whom the same accrued or shall accrue, were or are residents of this State."

"Sec. 20. When a cause of action has arisen in a state or territory out of this State, or in a foreign country, and by the laws thereof an action thereon can not be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State."

We think, clearly, in accordance with the provisions of Section 18, the cause of action was not barred in this State. This section was enacted for the benefit of the residents of the State of Illinois, holding claims against persons residing outside the State, coming due while such persons are out of the State, no matter if such debtor had never been in the State, as well as to such debtors who resided in the State, and after the claim became due or the cause of action accrued going out of the State.

We can scarcely imagine how the language of the statute could have been plainer to effect such purpose than it is. The object of the statute was to favor residents of this State as against residents of other states, territories and foreign nations, and to relieve them from the necessity of following their debtors all over the United States and its territories, and foreign countries, compelling them to sue in the forum where such debtor resides or may be found, if found at all, under pain of losing their debts by the running of the statute of limitations. Nearly if not every State in the Union has a similar statute and exception in favor of its own citizens. When we also consider the exception at the close of Section 18, providing that "the foregoing provisions

* * * shall not apply to any case, when, at the time the cause of action accrued, or shall accrue, neither the party against or in favor of whom the same accrued or shall accrue, were or are residents of this State," we are forced to the conclusion that the statute meant exactly what it said, and meant it to apply only to residents of this State, either debtor or creditor, having claims accruing to the creditor or against the debtor. The implication clearly is, if the section should apply to no others, it was intended to apply to them. Our attention has been particularly called by the appellee's counsel to the case of *Hymen v. Bayne*, 83 Ill. 256. We have examined that case with care and regard it as a strong case, by way of its argument, in favor of the appellant.

The question at issue in that case was stated by Justice Walker to be this: "The question is, whether, under our limitation laws in force prior to the act of 1872, when both parties have at all times resided continuously beyond the limits of this State for the statutory period, a bar to a recovery is created." In deciding upon the question as to whether the exception contained in the thirteenth section of the limitation law of 1845 was applicable to the facts of that suit where both parties had continuously been and resided out of the State till the bar of the statute of the State where they resided had run, the judge, after quoting the section which governed the suit then in question, held that as it then read it did not justify the plaintiff in his contention that his rights were saved by Section 13 of said statute.

The court further held that Section 20, of April 4, 1872, which is the same we have quoted and which is relied on in this case, applied to past transactions where the bar was complete under the laws of a sister State, and that the cause of action in that case was barred. Section 13 of the act of 1845, and which is now, as amended, Section 18, Chapter 83, R. S., reads as follows: "If any person or persons against whom there is or shall be a cause of action as specified in the preceding sections of this chapter, except real or possessory actions, shall be out of this State at the time of the cause of

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such action accruing, or any time during which a suit might be sustained on such cause of action, then the person or persons who shall be entitled to such action shall be at liberty to bring the same against such person or persons, after his or their return to the State, and the time of such person's absence shall not be counted as part of the time limited by this chapter."

The question in the mind of the court seemed to be as to whether a debtor who had never resided in this State and had never been in the State, was covered and made liable under that section, if he afterward was found in the State, and served with process. It did not, under that statute, seem to be doubted that a non-resident plaintiff would have his rights under the statute, if the cause of action had accrued while the debtor was in the State. And the court held the meaning of the statute to be, by implication from what was said, that if the debtor had thus been in the State, and going out afterward, returned, the statute during his absence would not run; the language of the statute, "his or her *return* to the State," being held as implying that the debtor must have been in the State previously, and as the debtor in that case had not been, he did not come within the saving clause.

But the court held this language: "If the General Assembly had intended to exclude from the operation of this provision cases like the present, it seems reasonable to suppose that they would have added after the words "shall be out of this State," or "shall reside out of this State at the time of such action accruing, or any time during which a suit might be sustained on such cause of action," etc., and might maintain "the action" after her or their return "to," or he, she or they "shall come within this State," etc. Now, it will be seen that the judge quotes almost the exact language of Section 18 as it then was and now is, and, no doubt, had Section 18 before him while writing that sentence. Besides fulfilling Judge Walker's requirements, the Legislature made it stronger by restricting the case to a resident creditor or debtor in this State at the time of the cause of action accruing.

The case of *Humphrey v. Cole*, 14 Ill. App. 56, and *Hyman*

v. McVeagh, 10 Legal News 157, noted in 87 Ill., but not reported, September term, Supreme Court Ottawa, 1877, which seems to be the authority on which Humphrey v. Cole, *supra*, was based, is relied upon by appellee as sustaining him. The construction put upon the words, "when a cause of action has arisen," found in Section 20 above quoted, is as follows: They "should be construed as meaning when jurisdiction exists in the courts of a State to adjudicate between the parties upon a particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue the defendant in the courts of the State upon the particular cause of action, without regard to the place where the cause of action had its origin."

As between a non-resident debtor and creditor, neither residing in this State at the time the cause of action accrued, the creditor, as appears to be held by our Supreme Court, would be compelled to seek the domicile of the debtor and sue him there within the statute of limitations, or his debt would be barred by the statutes of the State where the former resided.

We can not approve the decision in Humphrey v. Cole, *supra*, as to hold the rule there announced would be to entirely nullify Section 18 of Chapter 83 quoted above. If a cause of action accrues or arises in all cases where the debtor resides or may go, then the above section can have no practical value; Section 20 repeals it; but we do not so interpret it. If the rights of a creditor are saved by Section 18 if he resides in a State where the cause of action accrues, evidently it makes no difference where the cause of action accrues; but, undoubtedly, it accrues where the note is payable and where the payee resides.

We have examined the abstract and record on file in the clerk's office of the Supreme Court at Ottawa, for the purpose of ascertaining the facts in the case of Hyman v. McVeigh, *supra*, and find from the pleas that the facts are the same as in Hyman v. Byrne, 83 Ill. 256.

Both the maker of the note and the payee resided outside the State of Illinois when the cause of action accrued, and till after the bar in the other State was established.

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The expressions of the Supreme Court in that case, and quoted in 14 Ill. App. *supra*, were made with reference to the facts in that case, but have no application here. The decision of *Humphrey v. Cole*, *supra*, must have been made under a mistaken idea of what was really decided in *Hyman v. McVeagh*, 87 Ill. (noted.)

A case much in point, approving the policy of the different States in legislating in favor of resident creditors, will be found in *Chemung Canal Bank v. Lawery*, 3 Otto, 76.

It is insisted by counsel for appellee that from the first time appellee came into the State, the statute would begin to run without reference to the time he was out afterward. This can not be so. He must remain in the State ten years in all before he can acquire a bar under the Illinois statute of limitations. We make this decision without reference to the State where the notes were delivered.

Under Section 18 of our statute of limitations we regard that as of no consequence.

The cause of action accrued, *i. e.*, the notes fell due while appellants were residents, and they are entitled to the benefit of the saving Section 18 quoted.

For the reasons above given, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

SAMUEL B. POOL AND PRISCILLA TUCKER

V.

ROBERT TUCKER.

Replevin—Divorce—Property Surrendered in Lieu of Alimony—Estoppel—Evidence—Instructions.

1. No one can keep the benefits of a contract and at the same time repudiate its obligations and burdens.

2. A decree of divorce rendered against the husband in a suit in which he was served with process but did not appear, which recites that property

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theretofore given plaintiff by him, was in lieu of alimony, estops defendant from afterward claiming the property.

3. Such decree is competent evidence in a subsequent suit by the husband to recover the property mentioned in it.

4. The testimony of the wife is admissible to identify the property.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. DIXON & BETHEA, for appellants.

Messrs. MORRISON & WOOSTER, for appellee.

C. B. SMITH, J. This was a replevin suit brought by appellee against appellants, to recover the possession of one mare, one cow, one heifer and two shoats, all of the value of \$65.

Priscilla Tucker was the wife of Robert Tucker. Before their marriage Priscilla had worked for Robert as his housekeeper, and in the fields for about six months, for which she had never been paid. Some time after they had been married Priscilla left her husband charging him with cruelty and other bad conduct; Robert, fearing his wife would bring a suit for a divorce and claim alimony and insist on payment for her services, determined, as he says, to put his property out of her reach, and with that purpose in view he went to Amboy and sought the advice of a justice of the peace. While he was in the justice's office, he met Samuel B. Pool, an attorney, and Pool advised him to make a note and mortgage to his son for \$750, and then assured appellee that it could not be broken, with some adjectives not here necessary to repeat. This note and chattel mortgage was given, conveying all the chattel property Robert Tucker then had to Tucker's son. The proof shows that Tucker did not owe his son to exceed \$100, if indeed he owed him anything. The note and mortgage was plainly fraudulent, and as Tucker himself admits, was for a fraudulent purpose; and that appellant Pool advised and assisted him in the fraudulent scheme and

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for the avowed purpose of preventing his wife from getting anything out of his property. Pool does not deny this charge, although he was on the witness stand.

After this note and mortgage were executed, Priscilla Tucker, not knowing that Pool had been assisting her husband in a fraudulent scheme to cover up his property, went to him (Pool) for advice and assistance, to compel her husband to pay her for her labor. Pool advised her to commence an attachment suit against her husband on the ground (as we are authorized to infer) that Tucker had fraudulently been disposing of his property. There were no other grounds for an attachment. The attachment writ was sued out and placed in the hands of Jewett, a constable. Instead of sending the officer in the usual way to serve this writ, Pool went with him and directed the officer to say nothing about the writ, and not serve it unless he authorized him to do so. Pool and the officer called on Robert Tucker and Pool informed Tucker that his wife had come to town and wanted some of his property, and that he had come after it. Tucker expressed great surprise that the mortgage scheme so lately entered into under such flattering assurances from Pool as to its availability against all assaults, should have so suddenly lost all its power. Tucker finally consented to let Pool have the property in controversy in full settlement of all claims of his wife for her labor or for separate maintenance or alimony in any divorce proceedings which might thereafter be had against him. Some of the property was taken away, and the balance delivered the next day. On the next day Pool gave Tucker a receipt and a release from all claims for his wife for labor or alimony or separate maintenance. Tucker, on the afternoon of this settlement, and on the next day, told at least three persons that he had had a final settlement with his wife and was glad of it, and had done better than he expected to do. Shortly after this transaction and after he had repeatedly expressed his satisfaction with it he appears to have changed his mind and brought this suit. His only claim on the trial was that he gave up the property under duress and threats from Pool and Jewett, who threatened to take all the

property he had if he refused to give them what they demanded and he also insists that he was misled by the advice and direction of Pool, who, he then supposed, was acting as his attorney and advising him in his own interest and telling him that his wife must have some of the property anyhow, notwithstanding the mortgage, and that, being alarmed from the threats made that they would take all his property, and being misled with the advice of Pool that his wife must have some of his property, he did consent to give it up. Tucker admits in his cross-examination that he knew that afternoon before Pool left that he was there in the interest of his wife.

This admission is fatal to all his claim based on the supposition that Pool was his attorney. The proof also shows that the duress he now relies upon was an afterthought. Three witnesses testify that shortly after the property was taken and before all of it was taken away, he expressed himself well satisfied with the adjustment, and seemed pleased that he was done with it.

The proof also shows that the division of the property between himself and wife was fair and reasonable upon the question of alimony alone, without any reference to wages claimed by the wife. He fared quite as well, and probably better, than if the court had made the decision on a hearing of the divorce case.

Proceedings for divorce were afterward begun by Priscilla against him, and he was served with process and made default, and a decree passed against him awarding her a divorce, and in that decree it was recited that no alimony was allowed, because the parties had settled that question between themselves and satisfactorily to them, and the property of the defendant was released from all claim of dower, etc. This decree was an express adoption and ratification of the settlement by the court, and both parties being in court, were bound by it. The court, by its service on the defendant, had jurisdiction of him and his property and might divide it as justice required, between plaintiff and defendant, and when the court ratified and adopted their own division of the property or omitted to make division because they had

divided it, whether made between them willingly or unwillingly, then they were both bound by that division and by that decree.

Again, Robert Tucker went voluntarily the next day to Amboy and called on Pool, and instead of repudiating the alleged fraud and imposition upon him, and then demanding his property, he ratified it by taking a receipt and a release from Pool releasing him from all claims of his wife against him. This was a valuable and sufficient consideration for the release, and he could not hold this release and repudiate his acts in delivering up the property at the same time. No man will be permitted to keep the benefits of a contract, and at the same time repudiate its obligations or burdens imposed upon him. *Farwell v. Hanchett*, 9 N. E. Rep. 58; *Harzfeld v. Converse*, 105 Ill. 534; *Dillman v. Nadlehoffer*, 119 Ill. 567.

While the methods and conduct of Samuel B. Pool, as disclosed by the uncontradicted testimony, show him in an unenviable light, in engineering a fraudulent scheme for the pitiful sum of five dollars, and then using that very fraud as the foundation for suing out an attachment for another client, yet that disreputable, dishonest and most unprofessional conduct of Pool does not help Robert Tucker in his equally rascally and dishonest purpose to beat his wife out of the small pittance she gets out of the little property allotted to her between Tucker and Pool, especially when Pool took the heifer and shoats for his share.

The verdict is clearly against the evidence and should have been set aside.

It was also error to reject the decree in the divorce case, showing, as it did, a settlement between the parties of the matter in dispute in this case. That settlement was conclusive upon both parties to it; and while Pool was not a party to the divorce suit, yet all the title he pretended to have or could have under the evidence was through Priscilla Tucker. There is no pretense that Robert Tucker gave Pool any of the property for himself, but for his wife Priscilla, and Pool also claims he got it for her, and after getting it for her, and holding the title for her, he keeps the heifer and shoats for himself.

It was also error to strike out the testimony of Priscilla Tucker stating that she had taken the property in settlement, which was referred to in the decree. It was proper to identify the property described in the decree as the property she received from her husband in settlement for her alimony.

The first instruction is erroneous; it places the whole case upon the supposed fraudulent conduct of Pool and leaves out of view the fact admitted by Tucker, that he knew Pool was then acting for his wife, and it leaves out of view the fact that Tucker could not hold a full release from his wife in consideration of this property being given her, and at the same time reclaim the property, without giving back the release; and it also ignores the fact of the conclusive effect of the decree against Robert Tucker. It is true this decree was not in evidence, but it ought to have been, and the jury ought to have been told of its effect. The decree was before the court although not before the jury.

The second instruction is open to the same objection. It simply tells the jury that if Pool obtained the property from Tucker by fraud, then the plaintiff might retake it while in Pool's hands. While as a mere naked proposition of law fraud vitiates all contracts, and will justify a rescission by the injured party, it will not authorize a rescission and permit the injured party to keep the advantages of the transaction, if any, and yet that was plainly the legal effect of the second instruction.

We are reminded that this is the second trial of this cause, and that two juries have found the same way. The record of the first trial is not before us, but it will be time enough to urge upon us the finding of the jury, when the case has been properly and legally tried upon proper evidence and upon proper instructions.

Other objections are urged to the giving, refusing and modifying instructions, but they are not substantially different in principle from those we have considered, and it is not necessary to notice them further. The judgment is reversed and cause remanded.

Reversed and remanded.

Hardin v. Sisson.

H. D. HARDIN ET AL.

v.

HARRY W. SISSON.

Sales—Chattels—Delivery—Rights of Creditors—Attachment—Loss of Lien.

1. A sale of personal property without delivery is effective against creditors of the seller, unless they take action to avoid it before the purchaser takes possession.

2. The lien of an attachment is lost if the officer making the levy, or his agents, fail to retain the custody and possession of the property.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. POTTER & MACDILL, for appellants.

Messrs. KIRKPATRICK & ALEXANDER and A. P. HUTCHINSON, for appellee.

UPTON, P. J. February 20, 1889, appellants commenced proceedings in attachment in the Circuit Court of Warren County, against Myron H. Giddings, for the sum of \$448.07. The writ of attachment issued on the same day, and was, by the sheriff, levied upon the property in question, consisting of about 60 tons of hay, 100 bushels of corn, 50 bushels of oats, two colts coming two years old, one yearling heifer, one cow, together with some farming implements, etc. The property so levied on was upon a farm which had theretofore been owned and was then occupied by Giddings or his tenants, situate near Monmouth, Giddings and his family residing in the village or city of Monmouth, about one mile distant from the farm.

At the time of the levy two men were living in the Giddings house, upon the farm, with their families, one of whom,

Wilkinson, as tenant, was not in any way employed by Giddings; the other, Meyers, was in the employ of Giddings by the month, in caring for the stock on the farm. The sheriff did not remove the property when he made the levy thereon, but by the direction or with the assent of appellants, the attaching creditors, placed it in the custody of Wilkinson, who, by direction of the sheriff, fed the stock with the hay and grain levied upon.

After the attachment levy, Giddings used, as he had occasion, a portion of the property so levied upon, with the consent of the sheriff, and also fed out and used for his own benefit a portion of the hay and grain so levied upon, without objection, for which use of property and consumption of feed Giddings, as he testifies, "put up" \$100. Giddings also testifies that he had the entire control of the business at the farm, was there every day, and it seems certain, from the evidence, that he employed and paid Meyers for his labor while he was in charge of the premises and the property levied upon, from the 28th of February, 1889, until the 18th day of March, 1889.

On the 28th of February, 1889, Wilkinson left the premises and the property levied upon—except what had been used or removed by Giddings therefrom—and without further act, direction or consent of the sheriff or of any one in his behalf, the care, custody and control of the property levied upon was left remaining on the premises, and was thereafter, by the direction of Giddings, and at his expense, fed from the hay and grain so levied upon by Meyers, the employe of Giddings.

On the 18th day of March, 1889, Meyers abandoned and left the farm, removed with his effects therefrom, leaving the property so attached thereon uncared for, without attendants, and the farm and house thereon unoccupied.

On the morning of the 19th of March, Sisson, the intervenor, finding the premises unoccupied, as above stated, entered into and took possession thereof, with the personal property herein in question, under claim of ownership as hereafter stated, and from thence until the present has continued in possession.

Hardin v. Sisson.

At the May term, 1889, of the Circuit Court, to which the attachment writ was made returnable, Sisson, by leave of court, filed an interpleader in the attachment proceeding, therein claiming the property attached, pursuant to the statute.

Under this interpleader a trial was had, and to sustain the claim of right of property in Sisson, the intervenor, the following facts were sought to be established: That on the 2d day of February preceding the levy, Sisson being the owner of a farm in the State of Nebraska upon which was considerable personal property, consisting of stock, grain, hay and farming implements of considerable value, by a contract and conveyance in writing, exchanged his farm, with the personal property thereon, with Myron A. Giddings, for his farm in Monmouth, Ill., with the personal property thereon, being the property here in controversy, in pursuance of which contract and conveyance Sisson delivered the possession of his farm and personal property in Nebraska to Giddings, and by the contract Sisson was to have possession of the farm and personal property so purchased of Giddings, in Illinois, on the 1st day of March, 1889.

In the latter part of February of that year, Sisson removed from Nebraska, with his family and effects, to Monmouth, to reside upon the farm so purchased in exchange, but for some pretext or another Giddings objected to giving possession at that time, and Sisson was unable to obtain possession of the farm or personal property until the 19th day of March, 1889, as hereinabove stated.

In the meantime the personal estate, if not the real, also, which Sisson had sold by the exchange to Giddings, in Nebraska, had been levied upon by the creditors of Giddings, and was afterward sold in satisfaction of the demands of Giddings' creditors.

At the time Sisson took possession of the Giddings farm and the property here in question, he had no notice that an attachment had been levied thereon, or any attempt made to attach the same as the property of Giddings appearing in the record before us. Upon the foregoing facts as claimed by the inter-

venor, and concerning which there was but little substantial dispute, the trial of the right of property set up by the interpleader was had before a jury, who found the property in the intervenor, Henry W. Sisson, and after a motion for a new trial, the court entered judgment on that verdict, and an appeal was taken and is now before us for review.

We have examined the record with care, and are satisfied that the jury were fully warranted by the evidence in the finding of facts upon which to sustain the verdict, and that the verdict ought not to be disturbed unless the trial court erred in giving or refusing instructions which prejudiced the legal rights of appellants with the jury on the trial.

We need not examine in detail the several instructions complained of, for it will be seen that the determination of two or three legal propositions will cover all the errors complained of.

First. The main contention of the appellants, and the one upon which, as they insist, the case must be determined, put in their own language, is, "What issue can be determined in this proceeding?"

Appellants claim the only inquiry is whether the property attached was at *the time of the levy*, the property of the intervenor, and that inquiry must be limited to that time and none other. This contention we are not prepared to concede, at least to the extent claimed. In *Marshall v. Cunningham et al.*, 13 Ill. 21, the court said: "In the trial of the right of property under our statute, the only question is whether the property levied upon belongs to the claimant.

"The verdict must be against him unless it affirmatively appears that he is the owner.

"He is bound to show that the property belongs to him and is therefore not subject to sale," etc.

This certainly does not support appellants' contention. The investigation in the court below was simply to determine whether the property in question belonged to the claimant, and whether it was or not subject to sale on the attachment levy. In that investigation it was practically conceded that as between the parties the exchange sale of the property in

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question was *valid*, but as to the creditors of Giddings it was under the statute *invalid* without delivery of the possession by Giddings to Sisson.

It can not be disputed that as between the parties a sale or exchange of personal property, otherwise valid and perfected, is good without a delivery of the property sold or exchanged.

It was contended in the trial court, and that contention is renewed here, that inasmuch as our statute refers to a class of sales denominated fraudulent and void as to creditors, and that sales of personal property without delivery thereof by the seller to the purchaser are within that classification, the trial court erred in instructing the jury, by appellee's first instruction, in substance :

" If the jury find from the evidence that on the 2d day of February, 1889, claimant, Sisson, in good faith, and for a reasonable and valuable consideration, traded with Giddings for the property in controversy, then, although the jury may find from the evidence that by reason of Sisson's failure to obtain possession of the property at the time of its purchase from Giddings, the sale and purchase was, as against the creditors of Giddings, invalid or fraudulent in law, yet if the jury further find that after the levy of the attachment the officer making the levy left the property on the premises where found in the care or custody of one Meyers, the agent of Giddings, and that afterward, and on or about the 18th day of March, 1889, Meyers moved off the premises, leaving the property there in charge of no one in particular, and that it so remained until on or about the 19th day of March, when Sisson moved into the premises where the property then was, and that on moving on, said Sisson found the property on the premises, then the jury are instructed that the law is for the claimant, Sisson, and that the jury should so find."

If we correctly apprehend appellants' contention upon this point, it is, that the exchange sale of the property here in question, though otherwise complete and legal, was, in consequence of the non-delivery thereof to the claimant, absolutely void as against attaching creditors, and therefore an absolute nullity, of no force and effect whatever against the

creditors of the seller. We do not so understand the construction given the statute in question. In *Rappleye v. International Bank*, 93 Ill. 396, it was said that, "by the statute of frauds, deeds made in fraud of creditors are void; * * * in the case of *Lyon v. Robbins*, 46 Ill. 277, we held the deed from Miller, the judgment debtor, was not void, but only voidable; * * * such deeds, by the statute, are not absolutely void. * * * They vest the title in the grantee subject to be divested by the action of the creditors by attachment or levy," etc. So in the case at bar the sale, if otherwise perfected, was valid between the parties without delivery of possession to the purchaser, but subject to be avoided by the creditors of Giddings, the seller, by attachment or execution levy, etc.

Without some action to avoid the sale by the creditor, before possession was obtained by the purchaser of the property purchased, such sale was as effective against such creditors as against the seller. Wait on *Fraudulent Conveyances*, Secs. 317, 418 and 426; *Rappleye v. International Bank*, *supra*.

Second. We have seen that some action must be taken by the creditor, to avoid the sale alleged to be invalid for non-delivery of the property sold; it remains only to inquire, was the proceeding by attachment and levy upon the property in question, by the creditor of Giddings (the appellant), valid and effective for that purpose.

Section 14 of Chapter 11, *Starr & C. Ill. Stats.*, provides: "The officer serving the writ (attachment) shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court," etc.

The lien of an attachment is created by law on prescribed conditions, which must be strictly pursued. *Waples on Attachment*, 22, 544.

In order to maintain the validity of the attachment levy and the lien thereby created, the officer serving the attachment writ must take, *retain and continue* in the legal custody of the property levied upon. *Waples on Attachment*, 177, 544; *Fairbanks v. Bennet*, 52 *Michigan R.* 63; *Carrington v. Smith*, 8 *Pick. (Mass.) R.* 418.

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In *Sanderson v. Edwards*, 16 Pick. (Mass.) 144, where an attachment had been levied upon certain personal property and it was placed in the hands of a keeper by direction of the plaintiff in attachment, the keeper went away, abandoned the possession and custody of the property and it was taken upon another attachment, the question arose between the officers making the levies, as to which had priority. The court held the lien of the first attachment and levy was lost; that in order to maintain the lien created by an attachment of personal property, the officer must, by himself or another, retain the custody of the property attached, etc. 1 Wade on Attachment, Sec. 164, and cases there cited, is to the same effect; *Bridge v. Wyman*, 14 Mass. 190. *Taintor v. Williams*, 7 Conn. 271. In the last cited case it was held that if the actual possession by the officer making the levy, by himself, his agent or employe, be *relinquished*, the *lien of the attachment levy terminated*. *Baker v. Warren*, Gray (Mass.), 527.

Flanagan v. Wood, 33 Vt. 332, is in many essential particulars like the case at bar, and fully sustains the ruling and instructions of the trial court.

In *Pollard v. Sleeper*, 28 Vt. 709, the court say the property then was in the possession of the hired man of the vendor, etc., and such possession must be regarded as the possession of the vendor. If we are correct in the foregoing premises, it must follow that the attaching creditor obtained no lien upon, or right to, the property in question, by the attachment levy, as against the claimant, Sisson, in consequence of the neglect on the part of the officer holding the attachment writ to take and retain possession thereof by himself, agent or servant, as required by law, but that he abandoned the same and thereby released the lien of the levy thereon, and the court below did not err in so holding, and that judgment is affirmed.

Judgment affirmed.

CAROLINE C. GOULD

V.

THE ELGIN CITY BANKING COMPANY ET AL.

Practice—Proceedings before a Master—Continuance—Mortgage—Release—Evidence.

1. After a master has made his report, a motion by a party who, though notified, persistently neglected to appear before him to refer the cause back, is properly denied.

2. Nor has a party under such circumstances the right to make his defense before the court.

3. A master's report, to which no exceptions have been filed, is conclusive against the parties upon the facts found and conclusions stated.

4. Refusal to continue a cause on account of the absence of counsel is not error.

5. The evidence in this case, held, not to establish a parol agreement to release a mortgage.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. J. W. RANSTEAD, for appellant.

Messrs. SHERWOOD & JONES, for appellees.

C. B. SMITH, J. This was a bill filed against Caroline C. Gould and her husband, C. W. Gould, to foreclose a deed of trust given by Charles W. Gould to L. C. Bosworth, trustee for the bank, to secure two notes executed by C. W. Gould, one for \$2,200 dated January 2, 1882, and also signed by Edmund Hugg, and one for \$4,000 which was also signed by Robert McAdam, dated February 6, 1882. The trust deed was dated the 2d day of September, 1884. The trust deed covered what was, and is, called W. C. Gould's Spring street property in Elgin, and a certain cheese factory property in

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136 60
36 390
62 89
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Gould v. Elgin City Banking Co.

the city of St. Charles. At the time the trust deed was given, C. W. Gould occupied the Spring street property as a homestead and the St. Charles cheese factory was owned jointly by C. W. Gould and D. E. Moon. At the time this trust deed was executed, Gould was not married, or then had no wife living.

In addition to the property described in this trust deed, Mr. Gould owned and operated some twelve or thirteen other cheese factories in Kane and adjoining counties, a large farm in Cook county, and a good many lots in the city of Elgin, but it seems to have been all mortgaged to the Elgin City Bank or the First National Bank of Elgin. Mr. Gould's investments failed to prove remunerative and meet his financial necessities, and accordingly, in March, 1885, he made a general assignment of all his property to W. J. Hunter for the benefit of his creditors. This assignment was, of course, subject to all these mortgages in favor of these two banks.

Mr. Gould kept his bank account with these two banks. When the assignment was made, it was supposed by all concerned that the estate would more than pay off all the debts and there be still something left for Mr. Gould, and the homestead could be saved.

C. W. Gould married appellant after the execution of the trust deed and before the assignment. Whatever rights she had, therefore, in this homestead on Spring street, were subject to the trust deed.

C. W. Gould and his wife, the appellant here, filed their joint and several answers to the bill on the 7th of March, 1889.

In C. W. Gould's answer he claims large credits and payments on the notes described in the trust deed on account of moneys which the bank had received from the sale of some of his property, and also on account of rents received by the bank from the Cook county farm. Mrs. Gould answered and claimed a parol release of the mortgage on the Spring street property, the homestead, for a valuable consideration, under and by virtue of an agreement with the officers of the bank, and she insisted that as to that part of the property described in the mortgage the bank was not entitled to a decree of foreclosure.

After filing her answer, Mrs. Gould also filed a cross-bill setting up the alleged parol agreement under which she claimed that the bank had released the mortgage, and prayed for a specific performance of that agreement and for a release of the mortgage on the homestead. The agreement set out in her answer and cross-bill and relied on for relief was, in substance, that Mr. Bosworth, representing the bank, had agreed with her that they would release the mortgage on the homestead in Spring street if she would, on her part, sign all deeds to all the remaining property of her husband which had been included in the assignment to Hunter, and which she did do in consideration of such promises.

The Banking Company filed its answer to the cross-bill denying that it made any such contract of release. Issues were joined on bill and cross-bill, and on the 7th of March, 1889, the cause on the original bill was referred to the master, who was directed to take proofs and report his conclusions to the court.

On the 11th of April following, the parties appeared before the master by their solicitors and commenced taking the proof.

The complainant introduced its notes and trust deed described in the bill. Alfred Bosworth, cashier of the First National Bank, was also examined by appellee, who swore he was also familiar with the accounts and books of appellee. He was examined by both parties touching the indebtedness of C. W. Gould to appellee, and went fully and in detail into the state of accounts and stated the account between Gould and the bank. This examination of Bosworth was upon the question made in Gould's answer that he owed but little, if anything, on these notes. Bosworth then agreed that Mr. Gould might employ an expert to examine the bank books. At this examination Harvey A. Jones appeared for Mr. and Mrs. Gould, and Mr. Sherwood for the bank. At the close of the examination on that day the bank rested its case. Mr. Jones was then requested to take the testimony for the defense as soon as possible, so the case might be heard at the April term. On the day of the first examination Mr. Jones

fixed the 1st day of May when he would proceed to take his testimony.

On the 13th of April Mr. Gould employed Judge Ranstead to assist Mr. Jones in the defense. Judge Ranstead at once entered upon the defense of the case and within two or three days thereafter he and Sherwood had agreed upon an expert to examine the books of the bank.

When the first of May came, neither Jones nor Ranstead appeared to take this evidence. On the 8th of May Mr. Sherwood wrote Jones, and on the 9th of May the master wrote him, both asking when he was going on with the testimony, but no answer came to either of these letters. On the 20th of May the master fixed the 27th to proceed with the examination of the witnesses and notified Jones of the date. On the 24th of May, Jones met Sherwood and appealed for further time, saying that he was busy in court, and thereupon the 3d of June was agreed upon and Judge Ranstead notified of the time. On the 3d of June appellee's solicitor appeared before the master, but Mr. Jones still failed to appear. Judge Ranstead was there, but took no testimony nor offered to take any. The master then declared the proof closed and within a short time afterward notified Mr. Jones that he would present his report to the court on the 17th day of June.

On that day no exceptions had been filed to the master's report, and it was filed and appellee moved the court for its approval; appellant moved to have the cause referred back to the master to finish taking proof upon the original bill and to take proof on the cross-bill.

The court overruled the cross-motion to refer the case back to continue the evidence on the original bill, but gave appellant permission to produce her proofs on the cross-bill in open court, and set the cause for hearing on the cross-bill for the 20th of June.

On the 25th, Mrs. Gould moved the court for a continuance, on the ground of the absence of her solicitor, H. A. Jones. She set out in her affidavit that Mr. Jones had familiarized himself with her defense, and that he was also

familiar with the state of the transactions between C. W. Gould and the bank; that she had relied upon him to be present; and that his presence was necessary to a fair trial and investigation of the state of accounts between her husband and the bank, and that he could not attend on account of other pressing legal engagements in the preparation of cases in the Appellate Courts, and on account of being engaged in trials in other courts; but the court refused the motion to continue and compelled appellant to proceed with the trial. The chancellor thereupon heard all the evidence offered by either side in open court upon the cross-bill, and after full consideration, dismissed the cross-bill and rendered a decree of foreclosure on the original bill, for the amount found due by the master upon the notes described in the trust deed. From this decree Caroline A. Gould appeals to this court. She insists the court erred in refusing to refer the cause on the original bill back to the master, in refusing to grant her a continuance, and in dismissing her cross-bill and rendering a decree for complainants on the original bill.

We will notice these objections in the order named.

There was no error in refusing to refer the case back to the master after he had made his report, and especially so after the most ample and repeated opportunities had been offered appellant to take her testimony before the master. When a cause is referred to the master it is the duty of the parties to appear before him and take their proofs, and it is not a matter of right for them to decline or neglect so to do and then offer their proof in open court. Indeed the court has no power on the hearing of the cause to hear any evidence not offered before the master. *Cox v. Pierce*, 120 Ill. 556. The rule held in this case disposes of the third, fourth and seventh assignment of errors adversely to appellant, and Gould was properly refused the right to make his defense before the court which he refused or neglected to make before the master. Appellant's solicitors showed gross neglect and inattention in not keeping their appointments to take the proof.

But in addition to this they filed no exceptions to the mas-

ter's report, either before him or before the Circuit Court. Without such exceptions the master's report is conclusive against appellant and her husband upon the facts found and the conclusion stated, and there was therefore nothing to refer back to the master. *Prince v. Cutler*, 69 Ill. 267.

Nor was there any error in refusing to continue the case. It has been repeatedly held in this State that a refusal to continue a cause on account of the absence of counsel is not error. *N. W. B. & Mut. Aid Ass'n v. Prim*, 19 Ill. App. 224. And certainly not when there is competent associate counsel present assisting in the case, as was the fact here. But appellant lost nothing, so far as we can see, from a refusal of the court to continue the case. She was offered every opportunity to bring forward all her evidence, and if she failed it was her own neglect.

The principal contention, however, urged by appellant, is that the court erred in not decreeing her specific performance upon her cross-bill and canceling the mortgage. Appellant relied upon a parol agreement or understanding made between herself and officers and attorneys for the bank. After the assignment to Hunter of all Gould's real estate and property, it was thought advisable by all parties interested in converting the property into money, that Mr. Hunter should find individual private purchasers for these various factories, the lots and the farm, as soon as possible, and that he should make deeds to them with as little cost and expense as possible and save public sales, and apply the proceeds to the payment of these debts. Mrs. Gould had not joined in the deed of assignment, and when purchasers were found they refused to take the property unless Mrs. Gould joined in the conveyance. Thereupon Mr. Bosworth, representing both banks, went to Mrs. Gould's house and there had a conversation with her, and requested her to join in these deeds to purchasers as fast as they could be found. She first declined to sign the deeds, but she swears that when she positively refused so to do, that Mr. Bosworth then agreed with her that if she would sign these deeds for all her husband's property as purchasers were found, the bank would save her homestead

and release the mortgage on it, and that thereupon she signed the deeds and continued to do so until they were all signed.

Her husband, who was present on that occasion, swears that "The drift of the conversation between them was that if she would sign the deeds, they would save the homestead for her. He said it could be done and the homestead could be saved. After this talk she signed all the deeds they have there, and after that all the other property was sold."

Carl Botsford testified that he was a notary and went with Bosworth to Gould's house that evening, to take the acknowledgment.

He swears that Bosworth told her that by signing the deeds she would be more apt to save her home than by not signing them; that it would save expenses in foreclosing all the mortgages; that the bank undoubtedly had security enough to pay its claims without the homestead and that the homestead would be saved; but he says he has no recollection of hearing any promise by Bosworth to release or cancel the mortgage on the homestead, but he told her that her husband and Hunter had estimated the property at largely more than the debts, and he thought, himself, the homestead could be saved by making the property bring all it would and save expenses by selling at private sale, but that he thought the chance would be lost if she refused to sign the deeds; that he told her the bank would have to be paid in full, and that all expenses made in foreclosing, would, to that extent, help the bank's getting its pay without selling the homestead.

This was the substance of the proof, for and against the contract set up in the cross-bill. Waiving all questions of the statute of frauds, we think the evidence was not sufficient to justify the court in canceling the mortgage and ordering its release as to the homestead. Appellant's own husband, who heard the conversation, would not swear on direct examination that there was any agreement to release the homestead, but that Bosworth said it *could* be saved.

Botsford heard no promise or agreement to release it. Bosworth swears that he did not make any such promise. We think the appellant fails to establish her bill by a preponderance of the evidence.

Hays v. Waite.

Before a court will cancel a trust deed to secure \$6,000, the proof ought to be clear and satisfactory, and especially so when such alleged agreement is based upon no real consideration whatever.

Mrs. Gould had no real interest or estate of any kind in any of this property. She was married to Mr. Gould after all these mortgages had been made and all his estate, save the bare equity of redemption, had been conveyed away. After her husband had so conveyed his homestead in this lot, she could not, by afterward becoming his wife, destroy the effect of that conveyance by claiming a homestead or dower.

Neither of these estates could attach to her until the mortgages were paid.

Some other questions are raised and argued but they are such as only affect the rights of appellant and her husband on the original bill, and, as we have seen, they have waived all these questions by not excepting to the master's report, nor offering evidence before him. The decree will be affirmed.

Decree affirmed.

JOHN HAYS

v.

ADELBERT F. WAITE.

Intoxicating Liquors—Dram Shop Act—Contributory Negligence.

One who is injured by an intoxicated person can not, under the Dram Shop Act, recover damages from the saloonkeeper who furnished such person with liquor, if the injured person invited him to drink, or furnished him liquor which contributed to his intoxication.

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[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Ogle County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Messrs. FRANC BACON and W. M. TAYLOR, for appellant.

Messrs. HATHAWAY & BAXTER, for appellee.

C. B. SMITH, J. This was an action on the case brought by appellee, Waite, against appellant, John Hays, to recover for an injury received by appellee at the hands of one Vaughn. There was a trial before the court and a jury, resulting in a verdict for appellee for \$175. The court overruled a motion for a new trial and gave judgment on the verdict. Appellant brings the record before us on appeal and assigns the usual errors, among which are that the verdict is against the law and the evidence; that the court erred in admitting evidence for appellee, and in giving and refusing instructions. The evidence in this record discloses the following state of facts: Appellant, John Hays, was a saloonkeeper in the town of Rochelle, on the night of December 31, 1888, and kept an open saloon during that night. On the same evening the Hibernian society gave a dance at the Armory hall, which was continued until two or three o'clock in the morning of January 1st. Vaughn attended the dance with a lady.

Waite also was about the dance hall more or less during the evening. The proof is very clear that both Waite and Vaughn drank intoxicating liquor together at appellant's saloon on the night in question, and that they drank together as late as one o'clock in the morning. Appellee himself swears, "I was at the Armory hall when a dance was taking place. Vaughn, Jos. Cross, Barney Kegan and I went to Hays' saloon and Vaughn and I drew coffee for the drinks. Vaughn drank whisky three times; I set up the drinks once, Vaughn once and Cross once." Other witnesses testified to seeing both Vaughn and Waite in Hays' saloon at other times on that night, drinking together. Richard Crandall testified that on two different occasions he saw appellee treating Vaughn to whisky out of a bottle, and that witness drank with them in the Armory building out of this bottle of whisky furnished by Waite, and a small remnant of whisky left in the bottle after they had all drunk from it was poured onto Vaughn's clothing by Waite, and that they then both got to boasting of their manhood and got into a fight in the building. Witness says Vaughn had a knife,

Hays v. Waite.

and the witness then shoved Waite down stairs, and tried to get him to leave, but he would not, and that within a few moments Vaughn went down stairs and the fight was renewed, and that Vaughn then stabbed appellee, inflicting a serious wound, from the results of which appellee was confined to his bed about two months and expended about \$67 for doctor's bills.

The proof is clear that both Vaughn and Waite were under the influence of intoxicating liquor more or less during the whole evening, and that Waite treated Vaughn in the saloon once or twice and gave him whisky at least twice in the hall from a bottle.

Appellee now seeks to recover damages from Hays under the Dram Shop Act, for damages caused him through Vaughn, while drunk, which drunkenness was caused from liquor obtained from Hays on the night in question. Under the testimony of appellee himself, we think it very clear that he can not recover in this case.

He himself was the active and persistent agent in causing Vaughn's intoxication and in keeping him intoxicated until Vaughn inflicted the injury upon him of which he complains.

The statute was never intended to cover any such case.

A party complaining of the wrongful act of a saloonkeeper in causing the intoxication of another, from which damage or injury results to him, must not be an active and willing agent with the saloonkeeper, assisting in causing such intoxication. Nor will such complaining party himself be allowed to furnish liquor which, in whole or in part, causes such intoxication of another. No person can profit by his own wrong-doing, nor will the law allow a recovery for an injury resulting from a force put in motion by the wrongful or illegal act of the person complaining. This consequence results from the general law of contributory negligence, and will apply as well to injuries resulting from an intoxicated person as to any other cause of injury arising from the negligence or procurement of the party injured.

We know of no exception in this State to the general rule of

law that prevents a recovery for injuries received by persons where the person injured has, in a material and substantial degree, contributed to his own injury through his own negligent, wrongful or illegal act, except in cases where the direct and immediate cause of the injury was the result of the wilful or malicious act of another.

The courts have repeatedly had occasion to consider the very question involved in this record, and we know of no case where any person has been permitted to recover from saloonkeepers for injuries received at the hands of intoxicated persons under similar statutes to our own, where the person who had received the injury had been an active agent in causing the drunkenness. *Rosecranz v. Schumaker*, 26 N. W. Rep. 794 (Sup. Court of Michigan); *Englekew v. Hilger*, 43 Iowa, 563.

In *Reget v. Bell*, 77 Ill. 593, our own Supreme Court seems to have gone still further, in argument at least, in defeating a recovery for injuries to a wife on account of the death of her husband, resulting from intoxication, because she did not take whisky from him and pour it out of a jug while he was in a drunken stupor.

In that case the wife had no agency in procuring the whisky or in getting or inducing her husband to drink it, and was guilty of no wrong or misconduct disclosed by the record or appearing in the opinion of the court; but notwithstanding this the court said, "She could have deprived him of this whisky, had she been so inclined, by breaking the jug or throwing away its contents while he was in bed. We are bound to consider she was a willing party to the conduct of her husband and instrumental in bringing the loss upon herself." We quote this language, not for the purpose of adopting it as our own, but for the purpose of showing that even passive non-action on the part of the injured party may defeat his right of recovery.

It is alleged the court erred in giving the plaintiff's fourth instruction. That instruction is as follows:

"4. The jury are instructed that even if you believe from the evidence that on the night of the injury to the plaintiff,

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that the plaintiff was intoxicated or partially so, and that the plaintiff drank intoxicating liquor with said Vaughn and treated said Vaughn to intoxicating liquor in the saloon of the defendant, these facts, even if they are true, constitute no bar to recovery in this suit by the plaintiff; and the fact that the plaintiff was intoxicated on that occasion is only proper evidence for the jury in determining the weight to be given to the testimony of the plaintiff, and in passing upon the circumstances attending the injury to plaintiff and the cause of the same."

It will be seen from what has before been said that this instruction did not announce a correct rule of law and should have been refused.

The defendant asked the court to give the jury the following instruction, viz.: "The jury are instructed that if they believe from the evidence that the injury complained of was brought about or caused by plaintiff in giving Vaughn intoxicating liquor, or if you believe from the evidence that such injury was occasioned to the plaintiff by some act of provocation to said Vaughn on the part of the plaintiff, if any such appears from the evidence, that the injury sued for would not have been inflicted but for said acts of the plaintiff, that then the plaintiff can not recover in this suit, and you should find for the defendant." But the court refused it. Three others embodying the same principle were asked and refused, and no others were given of a like character. These instructions announced a correct rule of law and were in harmony with the views we have expressed, and some of them should have been given, and it was error to refuse them.

It is also insisted that the injury resulting to appellee from the stabbing was not one of the probable and direct consequences which might have been foreseen, and liable to happen as a probable consequence or direct result of the wrongful act complained of in the declaration. This objection seems to be supported by *Schmidt v. Mitchell*, 84 Ill. 195, and *Shugart v. Egan*, 83 Ill. 56.

But we do not deem it necessary in this case to determine, if such a thing were possible, where the probable consequences

of an illegal sale of intoxicating liquor begins or ends, or what may be the probable conduct of a drunken man, so as to make the act flowing from the intoxication one which might reasonably be anticipated by the person causing the intoxication, and therefore make him liable.

For the errors above indicated the judgment will be reversed and cause remanded.

Reversed and remanded.

JAMES A. LARSON ET AL.

V.

JAMES LAIRD, FOR USE, ETC.

Practice—Execution—Replevin—Nul Tiel Record—Action on Replevin Bond—Costs.

1. In an action on a replevin bond, a plea of *nul tiel* record which answers the declaration in part only, is demurrable.

2. A judgment debtor who, under an execution, has turned out property to the sheriff, who has levied thereon, can not recall such property and turn out real estate instead.

3. In an action on a replevin bond given in replevin of property levied on under execution, plaintiff may recover the costs incurred by the judgment debtor in the action in which the judgment was recovered.

[Opinion filed May 28, 1890.]

APPEAL from the County Court of Iroquois County; the
HON. ALEX. L. WHITEHEAD, Judge, presiding.

Mr. C. H. PAYSON, for appellants.

Messrs. HARRIS & HOOPER, for appellee.

LACEY, J. This was an action of debt brought on a replevin bond given by the appellants, James A. Larson and Lemuel Milk, dated October 23, 1888. James Laird, the obligee and

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appellee, was the coroner of said county, and the real usee, Samuel E. Grove, was then sheriff, and Thomas James, the usee, a judgment creditor. The declaration shows that on the 29th of October, 1888, appellant Larson sued out of the Circuit Court a writ of replevin, and placed it in the hands of the coroner, appellee, to execute against the sheriff, Grove, who held, under execution in favor of one Thomas James, 2,000 bushels of oats claimed by appellant Larson, and the bond was given in pursuance of the statute in such cases, preliminary to the execution of the replevin writ. The bond was in the penal sum of \$600, and conditioned that if appellant Larson should prosecute his suit with effect and without delay, and make return of the said property, if return thereof be awarded, and pay all costs, etc., then the obligation to be void, etc.

The oats were accordingly replevied by the coroner, and placed in the hands of the appellant Larson. It was averred that the said Larson did not prosecute said suit with effect and without delay; that at the March term, 1889, Larson dismissed his replevin suit, and that the court awarded a return of the said goods, and that appellant Larson pay the costs of the suit; that Larson did not make return of the said goods or any part; third breach, that the amount of the costs awarded against Larson had not been paid, and for a further (fourth) breach, declaration avers that said writ was wrongfully sued out, and said Thomas James, by reason thereof, suffered a large amount of damages, to wit, \$400, and that the same or any part thereof had not been paid; and for a further (fifth) breach, appellee averred that the said James recovered at November term, 1887, of the said Circuit Court, a judgment against the said Larson for \$151.97 and costs of said suit, taxed \$49.64; that said James sued out a writ of execution directed to the sheriff of said county; that on October 22, 1888, the sheriff levied on the oats in question, and that these were the oats replevied; that James had been unable to collect the said judgment and costs, and that he had been greatly damaged.

Upon pleas and replication being filed, and issue joined, the case was tried in the County Court by a jury, and verdict was

returned in favor of appellee for \$600 debt, and \$233.96 damages. Motion for a new trial was overruled and judgment rendered on the verdict, from which judgment this appeal is taken.

Among the causes of complaint is the action of the court in sustaining the demurrer to the second plea, which was a plea of *nul tiel* record, as to the recovery in the first, second, third and fifth breaches mentioned in the Iroquois County Circuit Court, *i. e.*, the dismissal of the replevin suit and the judgment of return thereon, the judgment of costs against Larson, and the recovery by James of the judgment against Larson set out.

We think the demurrer was properly sustained to this plea. One of the special causes assigned for the demurrer was that the plea attempted to answer the whole declaration when in fact it answered only a part. The first breach was that appellant Larson failed to prosecute his suit without delay, and the second was that appellant Larson failed to make return of the goods and chattels awarded to be returned. The plea, then, as a plea attempting to answer the entire declaration and all the allegations thereof, was a failure. It answered certain record proofs which must be verified by the record, but not the entire declaration and material allegations thereof. *Arnott v. Friel*, 50 Ill. 174; *Goelz et al. v. Joerg*, 64 Ill. 114; *Mix et al. v. People*, 86 Ill. 329.

It appears, as we think, from the evidence, that when the sheriff called on Larson with the execution in favor of James, that the former turned out to him on the execution the oats in question, which the sheriff then and there levied upon.

Afterward the appellant Larson desired and requested of the sheriff to release the oats and allow him to turn out real estate, claiming his right under the statute. This we think he had no right to do; after once exercising his option and turning out the oats on the execution, he could not recall it and claim his right under the statute.

Besides, we find no evidence in the record that he ever tendered to the sheriff any unincumbered real estate, or in fact any real estate. It appears also that his real estate was incum-

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bered by a mortgage. In this view of the law there was no error in the appellee's 5th and 7th instructions. The gist of those instructions was that if the oats were turned out by appellant Larson to the sheriff and levied upon, then the appellee should recover, and that the burden of proof was on the appellant to show that Larson did not turn out the oats on the execution. We see no error in this, as above stated.

It is also insisted that the appellee could not recover any costs in the suit of James v. Larson, but his own. It is urged that James, in that suit, was only liable for his own costs, and upon no principle could he recover the costs made by Larson in the Circuit Court. We think the point not well taken. The coroner could bring the suit for all the parties interested. The legal right of action was in the coroner, and he can sue for the entire amount due to any person. "It is no concern of the defendant for whose use the action may be brought, and it is not necessary that any one for whose use a suit may be brought should have any interest or connection, otherwise, with the subject of the suit." *Atkins v. Moore*, 82 Ill. 240; *Northrop v. McGee*, 20 Ill. App. 108; *Blachford v. Boyden*, 18 Ill. App. 378. The sheriff had the oats levied on, and if they had been sold under the execution, all parties interested in the costs, as well as James, would have been entitled to receive their respective amounts from the sheriff. The execution was a lien on the oats for the entire amount of the execution and fee bill, and when they were wrongfully taken by Larson, he deprived the sheriff and all other parties interested of the means of making their respective claims. We therefore think the coroner should recover for the benefit of all concerned and there was no error in his doing so.

There being no errors in the record the judgment is affirmed.

Judgment affirmed.

WILLIAM H. LANGDELL

v.

MICHAEL HARNEY AND WILLIAM PAYTON.

Partnership—Joint Right of Action—Pleading—Presumption.

1. Where plaintiffs sue as copartners, their joint right of action will be presumed unless defendant interposes a verified denial of their copartnership.

2. In an action for labor performed this court declines to interfere with a verdict for plaintiffs.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Marshall County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. T. F. CLOVER and J. J. SANDS, for appellant.

Messrs. BARNES & BARNES, for appellees.

UPTON, P. J. This suit was commenced before a justice of the peace to recover for an alleged balance claimed to be due the appellees from the appellant for work and labor. Appellees recovered a judgment before the justice of the peace, and the suit was taken to the Circuit Court by appeal, and was there heard before the court and a jury and a verdict rendered for the appellees in the sum of \$21.60, upon which, after overruling a motion for a new trial, the trial court entered judgment, and a further appeal was taken to this court.

Two questions are relied upon in this court for reversal by the appellant, and constitute the only errors assigned upon this record, viz.:

1st. The appellees can not recover jointly, or as copartners, in this suit.

2d. The verdict is excessive.

First. It might be quite sufficient, to fully meet the first error assigned, to say that this action was originally brought by appellees as copartners, or joint contractors, or obligees, against the appellant; this is admitted by the record in the

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errors assigned. No proof of that joint liability or right of action was required of appellees, but that fact stood admitted *prima facie*, or presumed to be true as claimed, unless the appellant (defendant below) had interposed, by plea or otherwise, a verified denial of that fact, pursuant to the statute. Chap. 79, Sec. 58, Starr & C. Ill. Stats.; *Donnan v. Bang*, 3 Ill. App. 400.

This verified denial was not interposed, hence no proof was required of that fact in the first instance, and the point is not well taken.

But the record discloses that there was evidence of a copartnership, or joint right of action; both of appellees so testified in the trial court. Independent of the statute, therefore, the jury were justified in finding for appellees on that point.

Second. We have carefully examined the evidence in the record before us, and we can not say the jury were not justified in the verdict by them found. The facts were such as were peculiarly within the province of a jury to determine, not only as to the amount of the labor performed, but the nature thereof, and the jury had the parties and their several witnesses personally before them, and were far better able to judge of the weight to be given to their testimony than we possibly can be, and we do not feel called upon to disturb it. Finding no error in this record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

O. C. CREGO AND A. J. STONE

V.

THE PEOPLE, FOR USE, ETC.

Principal and Surety—Release of Surety—Sale—Evidence.

1. The sureties on a bond conditioned for the payment by the principal of a certain amount for merchandise which may be furnished him, are not

liable to a beneficiary who agrees with the principal for the payment of a larger amount.

2. One who sells merchandise absolutely to a manufacturer who has given bond conditioned for the payment of such dividends as he may earn, can not hold the sureties liable.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

MESSRS. HOPKINS, ALDRICH & THATCHER and F. M. ANNIS, for appellants.

It is a universal rule of construction that a surety can not be bound beyond the express and literal condition of his undertaking. He has a right to stand upon the very terms of his contract. *Field v. Rawlings*, 1 Gilm. 581. Any agreement between the principal and his creditors, by which the terms of the bond are changed without the assent of the sureties, releases the sureties from liability. *Cunningham v. Wren*, 23 Ill. 62; *Burt v. McFadden*, 58 Ill. 479; *Dodgson v. Henderson*, 113 Ill. 360; *People v. Toomey*, 122 Ill. 308.

A surety is not bound beyond the precise words of his undertaking, and in case of doubt as to his liability, the doubt is generally solved in his favor. *Stull v. Hance*, 62 Ill. 52; *Adams v. People*, 12 Ill. App. 380.

The liability of sureties is fixed by the instrument they sign, and can not be enlarged or varied by judicial construction. *Burgett v. Paxton*, 15 Ill. App. 380; *Mix v. Singleton*, 86 Ill. 194; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305.

MR. CHARLES WHEATON, for appellees.

A parol agreement to vary a contract under seal will not discharge the surety on a sealed instrument. *Chapman v. McGrew*, 20 Ill. 101; *Chidester et al., v. S. & L. S. E. R. W. Co.*, 59 Ill. 87.

An obligation by an instrument under seal can not be discharged by parol. *Davy v. Prendergast*, 5 B. & A. 187; *Bulteel v. Garroad*, 8 Price, 467; *Trent Navigation Co. v. Harley*, 10 East, 34.

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See, also, 1 Addison on Contracts, Secs. 361 and 362, where it is held: "That where two or more persons enter into a contract of a continuing nature, one of them can not, by his own act, discharge himself from liability and put an end to the contract, without the consent of the other, and that covenants under seal can not be discharged before breach by parol contract, whether executory or executed, nor could the performance of a covenant be waived by parol."

C. B. SMITH, J. This was an action of debt on a bond executed by James H. Broomell as principal, and Owen C. Crego and Andrew J. Stone as sureties, in the penal sum of \$6,000, dated March 31, 1884. The condition of the bond was as follows:

"The condition of this obligation is such that if the said James H. Broomell, proposing to carry on the business of manufacturing butter and cheese on the dividend plan at a factory for that purpose, situated in the town of Aurora, in the county and State aforesaid, shall, on or before the first day of each month, make, acknowledge, subscribe and swear to a report in writing, showing the amount of products manufactured, the amount sold, the prices secured therefor, and the dividends earned and declared for the third month preceding the month in which said report is made, and shall file a copy of such report with the clerk of the town of Aurora, in which said factory is located, and shall also keep publicly posted in a conspicuous place in such factory a copy of such report for the inspection of patrons thereof, and shall further promptly pay all such dividend so reported, made and declared to the persons entitled thereto, then this obligation to be void, otherwise to remain in full force and virtue."

The declaration averred that Urch had furnished a large amount of milk to Broomell on the dividend plan, for the months of January and February, 1885, amounting to \$325.28, and that Broomell had declared a dividend for these two months, but had not paid him the amount of such dividend, as required by the conditions of the bond, etc.

The plea was the general issue, with an agreement that all proper matters of defense might be made under that plea. A

jury was waived and the case tried by the court. The court found the issues for the plaintiff, and gave judgment for \$293.15.

Broomell, the principal, was not sued, and the defense was made only by the sureties. The defense set up and relied upon was that Urch did not furnish Broomell milk on the dividend plan, and did not receive his pay for any milk furnished upon the dividend plan, but, on the contrary, sold his milk directly to Broomell, to be paid for at the prices fixed, and paid for milk by Mr. Moon, who was running a butter and cheese factory at Batavia.

Broomell opened his factory under the terms of this bond to his patrons, about the 7th of April, 1884, and suspended business about the 1st of March, 1885. He had between thirty and forty patrons in all, who furnished him milk on the dividend plan.

Urch furnished him milk during the entire time he operated until his suspension, and was paid in full for every month, except the months of January and February, 1885. Urch himself swears that he furnished his milk until about the 1st of August, for the dividends declared by Broomell at North Aurora, but that he then became dissatisfied with the dividends paid by Broomell, and then informed Broomell that unless he paid him the same dividends which Moon was paying his patrons at Batavia, which were higher than Broomell had been paying, he would not furnish him any more milk, but would take his milk to Batavia. The following extract from Mr. Urch's testimony on cross-examination will show what his understanding of the transaction was :

"Q. You say the statements for the months of January and February were sent to you by mail and called for a larger amount per hundred than the dividends declared by Broomell for those months? A. Yes, sir.

"Q. You were willing to take the money if you could get it? A. Yes, sir, I would take all I could get.

"Q. As shown by the statements, though, it was larger than the declared dividend? A. Yes, sir, I knew what dividends Moon declared at that time.

"Q. Didn't Moon pay the exact amount that the statement sent you for January and February gave? A. Yes, sir.

"Q. And that amount was larger than the dividend declared to the other patrons of the North Aurora factory?

A. Yes, sir. The statements sent me for November and December corresponded with Moon's. It was some time in August when he commenced to send me the Batavia dividend instead of his own. In August, or the fall of 1884, Broomell sent me an amount corresponding with the Batavia dividend rather than his own. It was not exactly by agreement. In the summer or fall of 1884 I was going to withdraw my milk from Broomell and take it to Moon; I was not satisfied with the dividends he was paying. We had some talk on the subject. Before that he didn't send me as much dividends, and he paid me the difference afterwards.

"Q. That amounted to his paying you the Batavia price? A. Yes, sir.

"Q. Then all the time you took milk there he paid you the Batavia price? A. Yes, sir, made up the difference some time later.

"Q. Then he paid you more than he did his other patrons? A. More than he did some of them.

"Q. You never objected when he sent you those statements corresponding with the amount Moon paid in Batavia?

A. No, sir.

"Q. How did he come to pay you more than he did the other patrons? A. He came to my farm and said as mine was a larger quantity of milk he would guarantee me as large a dividend as Batavia paid, if I would take it to his factory.

"Q. Do you know what dividends Broomell declared for January and February, 1885? A. Not exactly, it was five or ten cents less than Batavia paid."

Urch swears that but one other patron of the Aurora factory had the same arrangement with Broomell with which he was favored.

Urch being called on behalf of the defense, further testified as follows:

"I had a talk with Broomell afterwards about that matter.

He came out to my place and said he would pay as much as Batavia paid. He wanted to get my milk, and I told him that I didn't want to take it there because he didn't pay as much as Batavia paid; and then he said he would pay as much as Batavia, or more, and would guarantee me as much as Batavia paid if I would bring my milk to his factory. I didn't make any arrangements with him at that time.

"Q. When did you? A. I didn't make any arrangement whatever with him. I put my milk in his factory and took his word for it."

James H. Broomell, the other party to the milk contract with Urch, testified in relation to the contract, as follows:

"Q. What contract or arrangement did you have, if any, with said William Urch for his milk, that is, the milk delivered at said butter and cheese factory at North Aurora? State fully. A. I had a contract during most of the summer and fall of 1884, to put his milk in at the same price as Moon paid at Batavia.

"Q. Did you purchase William Urch's milk to manufacture it on the dividend plan? A. I did purchase it and did manufacture it on the dividend plan during most of the summer of 1884. * * *

"Q. If you ever had any conversation with Urch about buying his milk and making it up on the dividend plan, state what those conversations were. A. I had one or two conversations with Urch about buying his milk and making it up on the dividend plan. I can not give the exact language, but the substance of these conversations was that Urch stated that he did not want to take his chances on the North Aurora dividends, but would sell his milk to me at the same price as Moon paid at Batavia, and if I would not do that he would take his milk to the Batavia factory. I tried to convince him that on the average he would do as well at the North Aurora factory, and had better continue on the dividend plan. Failing to convince him and fearing to lose his milk, I agreed to pay the same as Moon paid at Batavia."

These were the only witnesses who testified as to the terms of the contract, and it will be seen there is a substantial agree-

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ment between them. We think from the testimony of both of these men, that it is very clear that Urch did not furnish his milk to Broomell on the dividend plan after August, 1884, and that, even for the time preceding that date, Urch compelled Broomell to make good his loss, or difference between what he had received of Broomell and what he could have received at Batavia, on condition of furnishing him any more milk even at the advanced prices paid at Batavia, and that for all succeeding months the dividends paid by Broomell to his patrons at North Aurora had nothing whatever to do with the sum to be paid Urch for his milk, but that he was to receive in payment for his milk a sum equal to the highest dividends paid by Moon at Batavia, and the proof is clear and uncontradicted that he was paid the Batavia prices for the whole nine months he furnished milk and that for all this time he received a higher price for his milk than Broomell's other patrons, with one exception.

This was a wholly different scheme from the one guaranteed by the condition of the bond. The condition of the bond is that the principal, Broomell, should pay all such dividends as were earned and declared at North Aurora, and from such milk as was furnished there, for the purpose of accepting in full payment for such milk only such dividends as could be earned and declared at North Aurora. The obligors on this bond did not obligate themselves to pay dividends which might be declared at Batavia, or any that might be equal to others declared at Batavia, unless the business justified such dividends, and even then such dividends must be alike as to all patrons, and give to each patron his just proportion of the net earnings of the factory.

The contracts and obligations of sureties are always to be strictly construed in favor of the sureties. Nothing can be taken by implication or argument. The strict and clear letter of the bond is the measure of their liability.

Beneficiaries under the bond will not be permitted to enlarge the liability of sureties, or to change their contract, by any sort of device. This rule is so elementary that citations in its support are hardly needed, but we refer to two: *Dodgson v. Henderson*, 113 Ill. 360; *People v. Toomey*, 132 Ill. 308.

This scheme entered into by Urch and Broomell was liable to operate as a fraud upon every other patron of Broomell, for just in proportion to the excess of Batavia prices over North Aurora prices paid Urch for milk, to that extent diminished the fund out of and from which the dividends to every patron of the North Aurora factory should have been equally declared, if Urch was paid in full out of the earnings of the Aurora factory. Under the private arrangement between these parties Urch received more than his just share of the earnings of the factory, and every other patron received less than his just share, and to that extent was defrauded by the act of Urch.

We think the proof shows an absolute sale of the milk by Urch to Broomell, and that the price to be paid was to be fixed by Mr. Moon, of the Batavia factory.

In *Gould v. Warne*, 27 Ill. App. 651, it was held that bondsmen under a bond like the one in this case were only liable for dividends earned and not paid by the factory earning and declaring the dividends, and it was also held in that case that in cases where the proof should show a direct sale of the milk to the factory, then the bondsmen would not be liable for the purchase price of the milk.

The court below gave plaintiff judgment for only so much as he would have been entitled to if he had furnished the milk on the dividend plan, but this did not cure the fault. Under the proof he did not furnish his milk under the bond, and he has no rights under the bond whatever. The whole transaction was outside the bond, and plaintiff can not now remit what he intended to receive by an unfair scheme, and place himself under the protection of the bondsmen, and compel them to make good his loss.

It is also insisted the court erred in refusing to hold certain propositions as law, which were submitted by the defendants on the trial below. So far as this objection relates to the first, second and fifth propositions, we think the court properly refused to hold them as correct propositions of law, for the reason that they do not state propositions of law, but simply a statement of facts.

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But we think the court erred in refusing to hold the third, fourth, fifth and seventh as correct propositions of law. These propositions are all in harmony with the views we have expressed in this opinion, and we think contain a correct statement of the law upon the facts in proof.

The sixth proposition is not important, since it simply announces a correct legal conclusion from the evidence, and it may be doubted whether it announces such a legal proposition as made it the duty of the court to pass upon it.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ANTON GRESEK

v.

THE PEOPLE, FOR USE, ETC.

Principal and Surety—Masters in Chancery—Action on Bond—Fees—Set-Off—Decrees—Joinder of Issue.

1. The sureties on the official bond of a master in chancery are bound by his agreement to accept less than his legal fees.
2. A decree fixing the fees of a master in chancery at less than the law allows can not be attacked by his sureties in an action on his official bond.
3. In such an action, the people being the real plaintiffs, defendant can not raise a question as to the uses for which the action was brought.
4. Where a party has, without objection, gone to trial without joinder of issues, he can not complain on appeal.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Marshall County; the
Hon. T. M. SHAW, Judge, presiding:

Mr. FRED. S. POTTER, for appellant.

Mr. JOHN BURNS, for appellees.

C. B. SMITH, J. This was an action of debt, brought on the bond of Edward J. Reilly, master in chancery of Marshall county, against Reilly and his surety, Anton Greser. The bond was in the penal sum of \$5,000, and signed by E. J. Reilly as principal, and Anton Greser as surety. The bond was in the usual statutory form. Greser, the surety, only, appeared and defended the action. The declaration, after reciting the bond and alleging that Reilly had entered upon the discharge of his official duties, alleges that at the June term of the Circuit Court for 1886, a decree in partition for the sale of certain premises had been rendered, and that Reilly's term of office was about to expire, and that, in order to get the parties interested in the decree for partition to allow him to execute the decree, he agreed to sell the land and accept \$50 in full for his fees; that the heirs and parties interested in the decree accepted his proposition, and that he thereupon sold the land, in part execution of the decree, for the sum of \$16,142.10; that he received out of the proceeds of the sale \$1,923 in cash, paid the solicitors \$300, as required by the decree, and reported his proceedings to the court, which was afterward approved. In his report to the court he reported his fee at \$50, which was also approved and allowed by the court.

It is averred that the master had retained and failed to pay over of this money to the parties entitled to it, \$1,573.

To this declaration several pleas were filed, the fourth one being that Reilly had paid over all the moneys according to the order of the court. The only question arising on this record falls under this fourth plea, and no other plea will be noticed.

The proof supports the allegations in the declaration as to Reilly's agreement to make this sale for \$50, for the heirs that he did make it, and received the amount of money stated in the declaration; that he reported the sale, and also his fee at \$50, and that this report was approved by the court and he was directed to pay over the balance according to the terms of the decree. It is agreed that he and his surety did finally pay all the money he received except \$200,

and that out of that sum he had the right to retain the \$50 allowed him by the court, being the sum he himself reported as due him for his services in keeping with his agreement to do the work for that sum. The surety now insists that, notwithstanding this agreement to execute the decree for \$50, the master may still charge the full limit allowed him by law, which in this case he insists is \$200, and that the sureties are not bound by the contract of their principal to charge less than his legal fee for his services, and that he may set up the residue of the fee as a full set-off or payment to plaintiff's claim.

We can not concur in this view of the law. We see no valid reason why the master might not agree to execute a decree for less than the fees allowed by law, if he so desired. There was nothing illegal nor anything contrary to public policy in such an agreement. It in no way affected the bond or liability of the sureties. The amount of the fees a master shall receive does not enter into or form any part of the contract of sureties, except in so far as the bond is a guarantee that he shall not charge or retain more fees than he is allowed to retain by law, or by decree of the court.

But, waiving the question of the master's right to remit any part of his fees, the record here discloses that his fees were fixed and determined by the decree of the court. He reported that his fees and charges were \$50, and the court approved that charge and allowed him to retain that sum, and directed the remainder to be paid out according to the interests of the parties. That decree was a valid and binding decree, both on the master and his sureties, as well as upon all parties interested in the estate, and concludes all parties to it until reversed, no matter how erroneous it may have been. The surety can not raise that question in this collateral proceeding.

It appears that after the order of distribution was made, and before any money was paid under the order, one of the heirs died, and his interest went to his heirs, making a supplemental decree necessary, which was afterward made by the court, directing to whom the master should pay the interests

of the deceased heir. This suit is brought to recover a part of the interest of the deceased heir, which went, by decree of the court, to the uses in this suit.

Appellant now contends that this suit can not now be maintained for the use of the heirs who inherited directly from one of the parties to the original suit, for the reason that the interest, being in money, must go to the administrator, and not to the heir. This claim is not tenable for two reasons: First, because the court directed the master to pay the money to the uses in this suit, and the court, having jurisdiction of the parties and the subject-matter, was authorized to make that decree, and it was binding until reversed, and the surety can not attack that decree collaterally; second, because the people are the real plaintiffs in this suit; the obligation is to them, and it is a matter of no concern to the defendant what the people do with the money when they get it, or for whose use the suit is begun. *Atkins v. Moore*, 52 Ill. 240; *Northrop v. McGee*, 20 Ill. App. 108.

It is, again, objected that a trial was had without any issue being joined on the special pleas. We find, upon inspection of the record, that the pleadings are involved in such interminable confusion, that it is very difficult, if not impossible, to find what were the issues before the trial court. But this question was not raised before the court below. If no issues were joined and the parties went to trial without an issue, they have waived that right. There was no motion in arrest of judgment below, nor is that error included in the assignment of errors in this court; and, even if any such error existed, it has not been brought before us by a proper assignment, so that we can consider it.

Appellant insists that the court erred in giving the 3d, 4th and 5th instructions asked by appellee. We think these instructions announced a correct rule of law, and were applicable to the case at bar.

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

Kolb v. Sandwich Enterprise Co.

CATHERINE KOLB, ADM'X,
V.
SANDWICH ENTERPRISE COMPANY.

36	419
45	137
36	419
74	461

Master and Servant—Personal Injuries—Defective Appliances—Contributory Negligence—Evidence.

1. A servant who is familiar with defective appliances on his master's premises, but makes no objection thereto, and exacts no promise from his master to remove the danger, can not recover for injuries sustained by reason thereof.
2. The opinion of a witness as to the defective condition of appliances, in an action for personal injuries sustained by reason thereof, is inadmissible.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of De Kalb County; the Hon. CHARLES KELLUM, Judge, presiding.

This was an action on the case brought against appellee under the statute concerning injuries caused by the wrongful killing of persons. The declaration counts for the wrongful killing of Henry Kolb, the husband of appellant, occasioned by a fall through a trap or hole in the floor of appellee's shop or manufactory in the city of Sandwich in said county.

The declaration charges that the appellee had negligently and carelessly constructed and maintained in the fourth floor of its said shop, a hole or trap about two and a half feet by five feet in size, and only four feet six inches distant from, and directly in front of an elevator opening on said fourth floor; that said hole or trap was usually closed by a trap door shutting down upon the same, and was used or opened only occasionally; that no guard or railing around said hole or trap, or on any side thereof existed; that a person in drawing a loaded cart from the said elevator out upon the said fourth floor, as the employes of said company were required to do, and as the appellant's intestate was engaged in doing when he came to

his death as alleged, would be brought into immediate proximity to the said trap or hole, when the same was open, and that the appellant's intestate and husband, who was an employe of the appellee, while in the line of his duty, and under the order of the said company, and in the exercise of due care and caution, in hauling a loaded cart out from the elevator aforesaid upon the said fourth floor of the appellee's said shop, inadvertently and through appellee's negligence in opening and leaving open the said hole or trap, stepped into the same and fell through it a distance of about twelve feet to the floor below, and was killed by such fall. Declaration further alleges that appellant is the administratrix of the estate of Henry Kolb, her late husband, that she was dependent upon him for support, and that he contributed in his lifetime pecuniary assistance for her support, and claims damages of \$5,000. Plea of the general issue was filed and a jury impaneled and sworn to try the case. At the conclusion of the plaintiff's evidence a motion was made by the defendant's counsel to exclude the testimony from the jury and to instruct the jury to find the defendant not guilty, which motion was allowed by the court and the jury were so instructed notwithstanding the objection of plaintiff's counsel, who excepted to the ruling of the court and entered a motion for a new trial, which motion was denied and judgment rendered on the verdict against plaintiff. Exception was taken to the action of the court in denying the motion for a new trial and entering such judgment, and the cause is brought to this court for review.

The evidence shows that the building was a large stone structure four stories high and forty by eighty feet, the long way being east and west. The stories are about twelve to thirteen feet high. The fourth story is used for a paintroom to paint the wood work of the manufactured articles. There is a communication between the lower and upper story by means of an elevator upon which materials are carried from the lower to the upper floor and the upper to the lower floor. The opening from the elevator to the room is six by eight feet, with double doors between the room and the elevator;

opposite or partly opposite to the elevator on the fourth floor there was a trap door, level with the floor, worked with the hinges on the east side and lifted by a ring in the door that communicated with the third story, which trap door was four feet ten inches by two feet eight inches, and north of the elevator and four feet and six inches distant; there are two doors to the elevator opening into the room on the north. The elevator works by steam. The elevator doors open into the middle of the elevator. The trap extended nearly as far west as the east door of the elevator with its long way north and south.

The deceased, Henry Kolb, on the 21st of December, 1888, was working in the factory under the charge of Fred Freeman, and employed on the first floor, and was running a sand drum, and had something to do in taking material to the upper floors; that his regular work on the morning of the 21st of December was to take the work up to the paint shop on the fourth floor; he was engaged in that on that morning, and just as the whistle blew at seven o'clock, or five or ten minutes after, he took a car with four wheels under it, loaded the stuff on it, and ran it into the elevator and ran it up. The cars were about four feet long and two and one-half wide, with handles at each end like a rack. He had at the time a half load of cotton planter handles.

Just before the deceased went up in the elevator to unload the stuff onto the upper floor, other of the appellee's employes had opened the trap door to shove some material through from the third to the fourth story, for which purpose this trap-door had been constructed and used.

The deceased, on reaching the fourth story floor, stopped the elevator on a level with the floor, and opened the west door, and pulled the car, loaded as stated, with his back out on to the floor of the building, and went backward and tumbled through the trap-door, and fell to the floor of the third story, a distance of some twelve feet, lighting on his head and shoulders, injuring him so severely that he died in a few moments. The cart, when found, was within eight or ten inches of the west side of the hole made for the trap-door,

the deceased having stepped a little too far east, not thinking the trap-door was open, and stepped with his left foot into the hole, causing him to fall. These were, in substance, the facts concerning the manner of the accident, as shown by the evidence.

Messrs. S. B. STINSON and HARVEY A. JONES, for appellant.

Messrs. D. J. CARNES and W. & W. D. BARGE, for appellee.

LACEY, J. It is insisted by the appellant that the appellee was negligent in placing the trap-door so near the exit of the elevator, and in a very dangerous position, and also in having the trap-door open at the time, it not being very light in the room, without warning the deceased of the fact of its being open; that it was a clear case for the determination of the jury, and the evidence tended, at least, to support the charge of negligence. The appellant's counsel contends that if the evidence tends to prove the negligence, then the court below had no legal right to take the case from the jury, citing *Penn. R. R. Co. v. Conlan*, 101 Ill. 93, and *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416, in support of the rule. We think the rule, as claimed, is too broad, or, at least, to the extent the counsel appears to claim for it. The words, "tends to prove," may be understood to mean in the least degree, or to mean, tends to prove the issue to the extent that a jury, after allowing everything in plaintiff's favor that the law allows, may legally find a verdict in favor of the plaintiff. We think the latter rule has been established by the Supreme Court. However, if there is a conflict of the evidence as to a material point in the evidence, then such point must be regarded as established, where the court interferes to take the case from the jury. But if, after all points are established that the evidence warrants the jury in finding, and there are not then in the case sufficient facts established which would authorize a jury to find a verdict in appellant's favor, then the court has the right to take the case from the jury.

We cite, as clearly establishing this rule, *Simmons v. C. &*

Kolb v. Sandwich Enterprise Co.

T. R. R. Co., 110 Ill. 340, 346; Abend v. T., H. & I. R. R. Co., 111 Ill. 202; The City of East St. Louis v. O'Flynn, 119 Ill. 200; Bartelott v. Int. Bank, 119 Ill. 259; The People ex rel. v. Board of Supervisors of Madison Co., 125 Ill. 334.

This, then, being the law, the next point to consider is, does the evidence, allowing all facts which the evidence tends fairly to show to be established, entitle the appellant to recover? Or would a verdict of a jury so finding be sustained? We think not. It appears that the deceased had been in the employment of the appellee for about seven years and knew all about the situation of the elevator and the trap-door. He had for some time been engaged in the very work at which he was engaged at the time he lost his life, and also knew or must be held to know that the trap-door was in constant daily use, that is, when occasion required, in pulling lumber and stuff up from the third to the fourth story, and that the trap-door was at any time liable to be open for that purpose. He remained in the employ of the company knowing all these facts. The evidence shows that it was light enough to work, but not as light as day, when the accident happened. But with the knowledge on the part of deceased that the trap-door was liable to be open at any time during working hours, it would seem that the darker it was in the room the more caution would be required of deceased in keeping a look-out for the trap-door, when he was working about it.

It is the law in this State, that "where the defects in the machinery and appliances are as well known to the servant as the master, the servant must be regarded as voluntarily incurring the risk from its use." Penn. Co. v. Lynch, 90 Ill. 333; St. L. & S. E. Ry. Co. v. Britz, 72 Ill. 356; L. B. & W. R. W. Co. v. Flanagan, 77 Ill. 365; Cummings v. Collins et al., 70 Mo. 520; Penn. R. M. Co. v. Hankey, 93 Ill. 580; Clark v. C., B. & Q. R. R. Co., 92 Ill. 43; Simmons v. C. & T. R. R. Co., 110 Ill. 347; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417.

It is also laid down as a rule of law that "trap-doors, hoist-ways and similar openings in floors, are a usual and necessary part of the machinery of business in most warehouses and manufactories; and the mere fact of their existence and use is

no evidence of negligence. Shearman & Redfield on Negligence, Sec. 508 (3d Ed). The deceased having entered into the employment of the appellee, and having become familiar with the appliances and machinery in the building and the manner of their use, and not making a protest, and continuing in its service without exacting any promise to change, took all the risk incident thereto, and the appellee owed him no duty to change. Hence where there is no duty there can be no negligence. C., R. I. & P. R. R. Co. v. Eininger, 114 Ill. 79; Cooley on Torts, 659.

There can be no question in this case of *respondere superior*, as the work all proceeded in the manufactory on the morning of the accident and at the time of it, in the usual and customary course. No special orders were given to go into a known dangerous place. The carrying of the material up to the fourth floor was the work he was partly engaged in all the time. The fact that the trap-door was open was no more than usual in the course of business. If the appellant's intestate had looked behind him and used any care at all, he could have seen the trap-door was open, for there was a man lying beside it. The appellant sought to prove by a witness or witnesses that, in the opinion of the witness, a trap-door like the one in question, situated as this one, was dangerous to a man employed like deceased; but the court excluded the proposed evidence and we think, rightly. For first, it could make no difference to deceased, as he continued to work with it in that way, and as we have shown, took all risk of such danger; and secondly, it was not competent to prove a fact of this kind by the opinion of a witness. Of this matter the jury could judge as well as the witness, and it was its province so to do. Nor was it competent to show that others had been hurt at the trap-door previously. This, for the same reason, and besides, as a rule of law, was not permissible. It was *res inter alios acta*, and hence not proper. Similar offers to prove similar matters were excluded, which we think rightfully. It is unnecessary to notice them in particular. There appears to be no error in the record of the court below, and the judgment is therefore affirmed.

Judgment affirmed.

Crosby v. Kiest.

MARY A. CROSBY AND FRANK CROSBY, IMPLEADED,
ETC.,

V.

JOHN C. KIEST.

SAME

V.

JOHN KELLY AND D. B. SHERWOOD.

36	42
135	458
36	42
1908	4622

*Foreclosure—Practice—Trial of Causes—Notice—Negligence—Sec. 14,
Chap. 77, R. S.—Sec. 17, Practice Act.*

1. Whether there is "good and sufficient cause" for trying a cause otherwise than in the order in which it is placed on the docket, as provided in Sec. 17, Practice Act, is a question for the court.

2. Where a party is duly notified of the time and place set for the trial of a cause, and fails to appear or object, he can not, on appeal, complain because the cause was tried out of its proper order.

3. Sec. 14, Chap. 77, R. S., providing for the advertisement of the time and place of sale under judgment or decree, applies only to sheriff's sales under execution.

4. In chancery causes the court fixes the time and place of sale.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon.
ISAAC G. WILSON, Judge, presiding.

MR. FRANK CROSBY, for appellants.

Messrs. HOPSON & HOLLEMBEAK, for appellees.

LACEY, J. Appellee Kiest, December 23, 1887, filed his bill to foreclose mortgage executed by appellants, Mary A. and Frank Crosby. The bill shows that they executed their mortgage on certain real estate in the city of Elgin, to secure a note of \$2,000, dated February 28, 1885, payable in two years, with interest at seven per cent, averring non-payment,

etc., and praying foreclosure. The bill averred that D. D. Sherwood, John Kelly and R. B. Chisholm claimed some interest in the mortgaged premises, which was subject to the appellee's mortgage. The above named Kelly, Chisholm and Sherwood waived service of process and entered their appearance. The Crosbys answered October 22, 1883, admitting the execution of the note and mortgage, and while admitting the non-payment of any part of the principal or of interest accrued since February 2, 1886, they aver that they were ready and willing to pay interest due for second year, and still are, but that appellee has refused to accept the same; that the two thousand dollar loan was procured through one Grote, acting for appellee, who agreed when first year's interest was paid, that payment of principal might be deferred for three years longer than the period named in the note; that appellee and Grote absolutely refused to receive the second year's interest, when it was due and offered by appellants, and demanded payment of principal.

Appellants, by way of cross-bill, set up foregoing agreement and refusal of appellee to fulfil the same, and pray that appellee's bill of foreclosure be dismissed upon payment by them into court of the amount due under such agreement. Kelly and Sherwood filed answers and cross-bill, claiming a note and mortgage of \$300 against appellants, but as appellees Kelly and Sherwood have been fully paid by appellants, and the trust deed and the said decree fully released by said Kelly and Sherwood, as appears by their written stipulation and copy of record of former release, which has been filed in this court, we need not further notice them and their decree, or appellants' second and third objections to the Kelly and Sherwood portion of the decree.

The decree of foreclosure was found in the original bill.

The certificate of evidence shows that the cause was reached for hearing on June 21, 1889, on the regular chancery docket of the April term, 1889; appellants, together with the complainant in the original bill and his solicitor being absent, the cause was passed. Notice to appellants served June 22, 1889, signed by appellee's solicitors, that on the 25th day of the

Crosby v. Kiest.

same month, at 10 o'clock A. M., appellee would ask the court to enter decree of foreclosure, in accordance with the prayer of appellee's bill and Kelly's cross-bill. On June 25, 1889, in the absence of appellants and their solicitor, the cause was taken up for final hearing, and proof made in open court that there was due on the note \$2,465.50, for which amount decree was passed in favor of appellee.

Appellants entered exceptions to the decree in the court below. It is claimed by the appellants that the cause was not lawfully taken for final hearing and that the action of the court in so doing was contrary to Sec. 17 of the Practice Acts, which provides: "All causes shall be tried or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct."

We do not think the point is well taken.

According to said section the court had a perfect right to dispose of the case otherwise than in the order it was placed on the docket, if there were good and sufficient cause, and of this the court was the judge.

We are not informed by the bill of exceptions what the cause was. "The statute gives the court discretionary power to try a cause out of the order in which it stands on the docket for trial, and, until rebutted, we must presume the discretion was properly exercised."

The above quotation was taken from the opinion in the case of *Reiman v. Ater et al.*, 88 Ill. 299. It appears from the bill of exceptions that the appellants had timely notice of the time and place set for trial of the cause; they entirely failed to appear to interpose any objection to the cause being then tried or to make any defense whatever, and in view of such negligence we do not think that the appellants have any proper standing in this court to insist on a point like this, wholly technical, and not going to the merits of the case. We also cite *Smith v. Third National Bank of St. Louis*, 79 Ill. 118; *Griswold v. Shaw et al.*, Id. 449; *Gardner et al. v. Baker et al.*, Id. 448; *Clock et al. v. Marfield*, 77 Ill. 258; *Anthony et al. v. Int. Bank*, 93 Ill. 225.

It is objected that the court erred in not providing in the decree that the sale should be advertised for three successive weeks, and Section 14, Chapter 77; R. S., is cited. But this section only applies to sheriff's sales under execution, and not to sale in equity. In chancery cases the court fixes the time of sale. *Augustine et al. v. Doud*, 1 Ill. App. 592; *Karnes v. Harper*, 48 Ill. 527. Sections 42, 47 and 48 of the Chancery Act authorize the court to make and regulate the enforcement of decrees. See, also, *Puterbaugh's Chan. Prac.* 392, 2d Ed. Finding no error in the record the decree of the court below is affirmed.

Decree affirmed.

36	428
75	171
36	428
88	83

FROHLICH, GARDT & COMPANY

V.

E. D. ALEXANDER ET AL.

Sales—Illegality—Avoidance—Delivery—Partnership—Dissolution.

1. The mere knowledge of the seller that the buyer intends an unlawful use of the goods sold will not avoid the contract of sale.
2. Delivery to a carrier of goods sold is delivery to the consignee, and the law of the place of sale and delivery governs the validity of the sale.
3. Where different sales are made, the illegality of one or more will not invalidate those which were legal.
4. Where several notes are given in settlement of an account embracing sales, one or more of which were illegal, the seller, in an action on one of the notes, may appropriate to the illegal sales such of the other notes as are sufficient to cover them.
5. The individual members of a partnership who continue to use the partnership sign, and give no notice of dissolution, are liable for debts contracted in the partnership name.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Warren County; the
HON. JOHN J. GLENN, Judge, presiding.

Frohlich, Gardt & Co v. Alexander.

Messrs. M. J. DAUGHERTY and C. C. CRAIG, for appellants.

Mr. I. M. KIRKPATRICK, for appellees.

UPTON, P. J. This was an action on a promissory note signed "E. D. Alexander & Co.," a firm theretofore composed of John E. Alexander and E. D. Alexander, who, for some years prior to the execution of the note, had been engaged in business as druggists in the village of Alexis, in Warren county. The note was made payable to appellants, which latter firm, at the time of its execution and for several years prior thereto, had been engaged in business at Galesburg in the purchase and sale of wines, whiskies and cigars, at wholesale.

In 1882 appellees opened an account with appellants in the purchase of alcohol, whiskies, wines and cigars, at wholesale, for use and re-sale in their drug store, the appellees hauling the goods so purchased across the country to their place of business in Alexis.

The purchases and sales continued until 1886. These purchases and sales were made, and the goods sold were mostly, if not wholly, delivered to appellees or their agents and carriers in Galesburg, at appellants' store or place of business, and were there sold mostly upon credit.

E. D. Alexander was the active member of appellees' firm. In September, 1886, the appellants presented their account for goods so sold to E. D. Alexander, and it was settled by appellants accepting three notes, signed by E. D. Alexander in appellees' firm name of "E. D. Alexander & Co.," one of which aforesaid notes for the sum of \$100, with interest at eight per cent per annum, payable in thirty days after date, and dated September 7, 1886, not being paid at maturity, a suit was instituted before a justice of the peace, from whose judgment an appeal was taken to the Circuit Court of Warren County, in which last named court a jury was waived and the issues submitted to the court, who rendered a judgment for the appellees, from which judgment this further appeal was taken, and that appeal is now before us. The several points

interposed in defense by the appellees in the courts below, and here again insisted upon, are :

1. Illegality of contract and consideration of the note.
2. No joint liability of appellees, defendants below.

First. It is established and conceded that the village of Alexis is a municipality in the county of Warren, Illinois, and by its ordinances, in force during the time of the making sales and delivering of the liquors so sold to the appellees by the appellants, the sale, barter or exchange thereof was prohibited within that municipality without a license for that purpose first had and obtained. It is shown by the evidence of E. D. Alexander that his firm never obtained a license for the sale of liquors from the village municipality. He further stated that he, if not the firm of appellees, did make sale of portions of the liquors so purchased of the appellants, in violation of the ordinances of that village. But it does not appear that the appellants, or either of the members of that firm, knew or were informed of the fact of such illegal sales, actual or contemplated.

From these facts it is insisted by the appellees that the consideration of the note in suit was the illegal sale of liquors by the appellants to the appellees, and that such sale was in violation of law and precludes appellants from recovering the price of the liquors so sold. In the support and refutation of this contention we are referred to a number of adjudicated cases from courts of the highest respectability upon both sides of the question, but which, in the view we take of the case at bar, will not require extended examination. It is sufficient to say the questions sought to be raised in this case have been much mooted in the courts of England, and in this country as well, and there has heretofore been, and to some extent there still exists, a decided conflict in the opinions of the courts of last resort in this country thereon, while in England the modern doctrine appears to be that "the sale of a thing, in itself an innocent and proper article of commerce, is void when the vendor sells it knowing that it is intended to be used for an immoral or illegal purpose," which has been followed in this country in *Hooker v. De Ealors*, 28 Ohio St. 251, in

Suit v. Marshall, 113 Mass. 391, in Wilson v. Stratton, 47 Me. 120, in Tollman v. Johnson, 43 Iowa, 127, in Hanauer v. Doane, 12 Wall. 342, and perhaps some others, following Langton v. Hughes, 1 M. & S. 593, determined by Lord Ellenborough in June, 1813.

In November, 1813, in Hodgson v. Temple, reported in 5 Taunt. 181, before Sir James Mansfield, in an action for the price of spirits sold with the knowledge that the defendant intended to use the spirits illegally, a verdict being rendered for the plaintiff, a motion for a new trial at *nisi prius* was refused by the court, Chief Justice Mansfield saying: "This would be carrying the law much further than it has ever yet been carried. The mere selling of goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment therefor, but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

The American doctrine generally received, and as we apprehend, based upon the clear weight of authority in this country is, that "the mere knowledge of the seller that the buyer intends an unlawful use of the goods sold, will not avoid the contract *between the parties*. But a purchase made with intent to use the property to commit a felony, or crime, involving great moral turpitude, if known to the seller, will prevent a recovery of the price."

This, in part, is based upon the decision of Hodgson v. Temple, 5 Taunt. 181, *supra*, and has been followed in this country in Armstrong v. Fohr, 11 Wheat. (U. S.) 258; Wallace v. Sark, 12 S. C. 576; Hill v. Spear, 50 N. H. 253; Tracy v. Talmadge, 14 N. Y. 162; Webber v. Donnelly, 133 Mich. 469; Bicket v. Sheets, 24 Ind. 1; Stute v. Curle, 4 Dana, 381; Cheeny v. Duke, 10 Gill & John. 11; Harris v. Runnels, 12 How. 79; Michael v. Bacon, 49 Mo.; Gaylord v. Soragen, 32 Vt. 110; Annfield v. Tate, 7 Iredell's L., 258; Hodges v. Wallace, 2 Busk. 412; Bishop v. Honey, 34 Texas, 245; McKinney v. Andrews, 41 Texas, 363, and many other cases. Benjamin on Sales of Personal Property, 4th American edition, Vol. 2, Sec. 790, 791, note 6. In volume 9, page 910, note

4, Encyclopædia of Law, the rule is thus stated: "As a *rule*, the vendor of goods will not be deprived of his right of payment therefor, when he *knows* that the buyer intends to use them illegally, unless it be made a part of the contract of sale that the property shall be, in fact, used for an unlawful purpose, or unless the vendor does something beyond making the sale in aid of furtherance of the unlawful design, or unless the illegal act contemplated is such that no man having a knowledge of the design can remain neutral without being, in a just sense, a criminal himself." See, also, Hilliard on Sales, 3d edition, top paging, 489. Manifestly, then, the case at bar can not come within the rule as claimed by the appellees, taken in its most favorable acceptance. The element of "*guilty knowledge*" is wholly wanting in the case at bar, which must be established by the appellees to bring the case within the ruling in *Langton v. Hughes*, *supra*, and kindred cases.

It is also contended with great earnestness that the doctrine of *Langton v. Hughes* has been followed in this State in *Lewis v. Headley*, 36 Ill. 433, and was cited with approval in *Cicero Mt. H. A. Co. v. Rosenthal*, 55 Ill. 85, which latter case has been cited and approved in *Roth v. Roth*, 104 Ill. 35, and in *Penn v. Bornman*, 102 Ill. 523. It is, we think, clear, in view of the whole evidence, that these sales were made in Galesburg and the goods were there delivered, and no part thereof was delivered or contracted to be delivered in Alexis; that the sale in the quantities sold by the appellants at the time and place of sale, was authorized by law; that appellants were in no manner informed that appellees were not authorized to make re-sale or use thereof, in their business as druggists in Alexis, or that the appellees intended to make unlawful use of the same or of any part thereof. Nor can it in any legal sense be said that the contract of sale or the delivery of the goods was in whole or in part to be *performed* in the village of Alexis, or that the ordinances of that village were in contemplation of either of the parties at the time of its execution, and hence were in no sense contravened in making the sale of the liquors in question in Galesburg. *Brechwald v. The People*, 21 App. Ct. Reps. 213.

In the case last cited it was held that the delivery to a carrier is a delivery to the consignee, and completes the sale, which is elementary, and the law of the place of sale and delivery would govern its validity. To the same effect are the following cases: *Hill v. Spear*, 50 N. H. 253; *Finch v. Mansfield*, 97 Mass. 89; *Parsons on Contracts*, Vol. 2, page 586.

Mr. Justice Clifford said: "The general rule which must govern this case is that it is no defense that the vendor knew that the goods purchased were to be sold in another jurisdiction in violation of law in that jurisdiction, unless it was a part of the contract that they should be so sold." *Tracy v. Talmadge*, *supra*; *McIntyre v. Parke*, 3d Met. 207; *Shotwell v. Hughes*, 1 Curtis' Cir. Ct. R. 245; *Hill v. Spear*, *supra*.

That the municipal laws and ordinances of the village of Alexis are foreign to the city of Galesburg, is regarded as too evident to justify discussion; and, if it be claimed that the sale was illegal in the city of Galesburg under its municipal regulations, it was for the appellees, who were asserting its illegality, to establish the fact, which is not attempted, and hence the presumption of law attaches, of its legality.

It is therefore unnecessary to inquire whether the one rule or the other, as contended for, has been adopted in this State; the case at bar requires the support of neither to sustain appellants' right of recovery, nor is the sale in question, under the evidence, invalid, under either rule stated.

It is claimed by the appellees that one barrel of whisky sold in 1885, after most of the goods were sold and delivered, was taken into the village of Alexis in the night-time (covered up in some way) by one Thomas, appellees' carrier, in violation of ordinances of that village.

It is also claimed that appellants furnished a box which was used by appellees' carrier to cover the barrel of whisky when taken from appellants' place of business in Galesburg.

There is no evidence tending to prove that any portion of the packages of whisky in box or barrel, so covered, was sold or used illegally, or was purchased with that intent by appellees, or that any part of the consideration of the note in

suit was for the agreed purchase price thereof. Besides, as was said by Lord Tenterden, in *Croakshank v. Rose*, 5 C. & P 19, which was a case like the one at bar, "It might be included in the other notes, and the seller had the right to appropriate the others to all the illegal charges in the account, which others were more than sufficient to cover the illegal sales, if those were illegal, as claimed."

It may be said that the furnishing box or cover for the barrel affords a strong presumption of guilty knowledge in the appellants of the illegal intent on the part of the appellees, but the facts and circumstances under which the box or covering was furnished—which are not shown by the evidence—might entirely rebut that presumption, such as holding the goods in place in the wagon in transportation, furnishing greater convenience of carriage to the carrier, or other personal choice, necessity or convenience of the carrier.

All that is claimed by appellees might have been done and still be consistent with entire good faith on the part of appellants in the sale.

We are not prepared to convict the appellants of an illegal act, or invalidate contracts apparently valid, upon presumptions of fact merely.

The sales in question were separate and independent transactions, and if it were shown that one or more were illegal (which we are not prepared to concede), that sale would not invalidate those sales which were legal.

Second. It is claimed that John E. Alexander, one of the appellees, had sold out his interest in the drug store and business at Alexis to his son, E. D. Alexander, on the 1st of August, 1884.

It is shown by the evidence that the business at the drug store was conducted in the name of the old firm of E. D. Alexander & Co. long after the 1st of August, 1884, and after the execution of the note in question the same sign of "E. D. Alexander & Co.," still remained over the door of the drug store as it had before that time, and no public notice had been given of the dissolution of the firm, prior to the execution of the note in suit.

Frohlich, Gardt & Co. v. Alexander.

It is clear under these facts, we think, that the appellees' second point can not be sustained. *Southern v. Grim*, 67 Ill. 106; *Holtgrave v. Wintker*, 85 Ill. 470; *Smith v. Vanderburg*, 46 Ill. 34; *Smith v. Knight*, 71 Ill. 198. John E. Alexander testified that he informed appellants personally of the dissolution of the firm and the sale of his interest therein to E. D. Alexander some time in the year 1884. This is expressly and positively denied by appellants, severally and personally. Conceding, however, that the notice was given as claimed by appellee John E. Alexander, it is certain that could not relieve him from liability of payment for that portion of appellants' demand which had accrued during the time that he was a member of appellees' firm, which confessedly would far exceed the amount of the note in suit.

We fail to perceive how the points contended for by the appellee can be made availing under the evidence in this case.

The evidence in the record before us we have carefully examined, as well as the findings of the court thereon, and the holdings upon the several propositions of law submitted, and it is manifest abundantly therefrom that the judgment of the court should have been for the appellants.

As to the propositions of law submitted on the part of appellants (plaintiffs below), we think the court should have held as requested in Nos. 2, 4 and 5. We think the holdings of the court upon the other propositions submitted, taken as a series, were correct. For the reasons stated the judgment of the Circuit Court is reversed and the cause remanded for further proceedings, as the parties may be advised, not inconsistent with the views hereinbefore expressed.

Judgment reversed and cause remanded.

36	436
139	219

JOHN C. CUSHMAN AND J. D. HARVEY

V.

THOMAS P. BONFIELD.

Railroads—Foreclosure—Reorganization—Issue of Bonds—Fraud—Evidence—Practice.

1. A plan of reorganization of a railroad company, whose mortgage is foreclosed, by which the bondholders agree that the property shall be bought in trust for them, and new bonds issued in an amount greater than the old issue, is not void, though it does not appear that the new issue is to be used for the purposes of the corporation.

2. In such case the trustee who purchases the property can not, so long as he holds title thereto, deny the interest of one of the bondholders for whom he purchased.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILLSBURY, Judge, presiding.

The complainant is the owner of bonds of the Plymouth, Kankakee & Pacific Railroad Company, out of 398 bonds secured by a first mortgage on the property rights and franchises of this company. Each of the bonds called for \$1,000, and is payable in thirty years, with interest at the rate of seven per cent, represented in coupons. Bills of complaint were brought in the Circuit Court of Newton County, Indiana, and the Circuit Court of the United States in the Northern District of Illinois, for the foreclosure of this mortgage, and decrees of foreclosure were duly entered in each case. In the Newton County Circuit Court it was provided that the sale should be made under the auspices of the Federal court, and such sale should be confirmed by the Newton County Circuit Court. In these decrees the complainant was found to be the owner of eight of these bonds, upon which there was then due \$10,360.44, and William C. Richards was found to be the owner of five of these bonds, upon which there was

then due \$6,624.51. The usual course was adopted by the owners of the bonds of this company, in making such sale, in purchasing the property and reorganizing it by electing a person, who in this case was appellant Cushman, to bid in the property at the sale, as trustee, for the benefit of all the bondholders. Three hundred and eighty-three of the bonds in the hands of the bondholders executed to Cushman powers of attorney under a plan of reorganization submitted to the bondholders and approved by them, and forming a part of the powers of attorney. This power of attorney empowered Cushman to purchase the property rights and franchises at this foreclosure sale as such trustee, and then reorganize the company, issue to each bondholder new bonds from the reorganized company, for the principal sum of their old bonds, in an issue at the rate of \$23,000 per mile, covered by a first mortgage, and for the accrued interest upon the old bonds, income bonds secured by a second mortgage. It also provided that the bondholders should pay \$5 upon each of their bonds, to be used to pay the costs and expenses of these suits and this sale, estimated at \$2,000. It was also stated therein that the attorneys' fees for the foreclosure of this mortgage, and \$2,000 allowed by the Federal court to George W. Cass for his services as trustee in the old mortgage, had been provided for in some special arrangements, nowhere explained in these proceedings, and would not be a call on the bondholders.

Among the holders of these bonds who executed this power of attorney and delivered to Cushman their bonds as such trustee were the complainant, then owning eight bonds with the coupons belonging to them, and Francis S. Campbell, administrator of the estate of William C. Richards, then deceased, owning five of the bonds and coupons thereto, belonging to the Richards estate.

Cushman accepted this trust, and at this sale bid in the property for the sum of \$4,000 as "*trustee of the bondholders*," as reported to the Federal court by Bishop, the master in chancery. Cushman then made a call on the holders of these bonds for the payment of \$5 upon each of these bonds according to the provisions of the powers of attorney and plan of reor-

ganization. Some of the holders of the bonds met this call and some did not. Among those who met the call were the complainant and Campbell. The complainant paid Cushman \$40; Campbell paid Cushman \$25. Subsequently Cushman made another call on the bondholders for \$4 on each bond, made necessary by reason of the deficiency, owing to a portion of the bondholders failing to meet the previous or first call, and the complainant under this call paid Cushman \$32, and Campbell as administrator paid him \$20. These were all the calls ever made by Cushman on the holders of these bonds. Subsequently the five bonds belonging to the Richards estate were sold under an order of the County Court at public vendue, with other notes, obligations and assets of the estate, and the complainant became the purchaser of them, and he thereby became the owner of thirteen three hundred and ninety-eighths of this property equity. The last call made by Cushman on the bondholders for \$4 was only met by a part of them, and he did not have money previous to 1881 to make payment on the amount of his bid. It appears that he made various attempts to raise the balance of the money necessary to pay the bid, in which he was aided by complainant and other of the bondholders at Kankakee, and many different schemes were suggested, discussed and dismissed to bridge over the difficulty so as to raise the amount of money necessary to pay the bid and confirm the sale. Many bondholders became dissatisfied at the situation, lost confidence in Cushman's ability to carry out the enterprise and took away from him their bonds and their money advanced to him, and in his answer he claims that in June, when he deeded the property to Thatcher and Taintor, as trustees of the Harvey syndicate, he only represented thirty-four bonds, thirteen of which belonged to complainant. Cushman says in his answer that Harvey in May, 1881, had become the owner of three-fourths of all the bonds.

The appellants claim that in February, 1881, Harvey, after having filed a protest in the Federal court against the confirmation of the master's sale to Cushman, furnished Cushman with the money to pay the amount of the bid, and upon

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the joint petition of Harvey and Cushman as representing the whole number of bonds, had the sale confirmed in Cushman and a deed issued to him for the property; and subsequently, on the 22d day of June, 1881, Cushman and his wife deeded the property as if he held it absolutely in his own right, to Thomas Thatcher and Giles E. Taintor, and on the 11th day of July, 1881, he made another deed of the same property to the Indiana, Illinois & Iowa Railroad Company, a corporation recently organized, recorded only in Illinois, and also another deed of the same property to Adam W. Spies, A. S. Comstock and George Holt, recorded only in Indiana.

The complainant on the 12th day of July, 1881, filed this bill of complaint for relief and asked that bonds might be given to him according to the plan of reorganization. The defendant, Cushman, answered this bill by claiming that the plan of reorganization had failed through a want of money to pay the bid, and because certain parties he had contracted with for completing the road had failed to perform, and that after receiving deeds from the officers of the courts, and to enable him to obtain these deeds, Harvey had advanced to him about \$10,000, including \$4,000 paid to Nichols; he conveyed the property, upon request of five-sixths of the bonds of the bondholders, to the Indiana, Illinois & Iowa Railroad Co.; and that Nichols had obtained a decree in the Newton County Circuit Court against the P. K. & P. R. R. Co., which became by the decree a lien prior to the mortgage, under which the property was sold and the title vested in Nichols, which was paramount to Cushman's title; and that before deeding this property to the I. I. & I. R. R. he received an agreement from Harvey to pay the owners of the bonds he (Cushman) represented \$50 for each of their bonds, together with all assessments previously paid by them, or in lieu thereof; by their first paying their *pro rata* share of the costs and expenses necessary to secure the absolute title of the property, they should receive ten shares in the capital stock in the I. I. & I. R. R. Co. for each bond, said shares being for \$100 each, which in effect was that this was to be in full for the interest of the bondholders represented by Cushman in

the property. Consideration of this conveyance was not stated.

The Indiana, Illinois & Iowa Railroad Company, in their answer to the bill, claim to have had no notice of complainant's equities, and denied the trust, and denied that Cushman ever had any valid title to the property; that the Nichols title was paramount, and that they held under this title. The appellant, Harvey, denied that Cushman was ever trustee of the complainant; claimed that he furnished money to pay up the bid, and an amount to pay Crawford & McConnel, solicitors of the complainant in the foreclosure proceedings, and also money to purchase the Nichols claim; and also claimed that the deeds to Cushman by the Federal court, and Circuit Court of Newton County were absolute, and not in trust, and denied that the property had any considerable value, and denied that complainant had any equities in it.

A supplemental bill was subsequently filed to which the defendants answered. Complainant here says that in these proceedings no evidence was offered showing this Nichols title. Harvey and Cushman claimed to have paid Nichols \$4,000, but so much of the defense as asserted that the Nichols title was paramount to the trust title in Cushman was abandoned.

In the appellants' argument in this case, as well as the entire evidence of appellants, it will be seen that the defense that Cushman was not trustee for complainant at the time he made the conveyances, and that the title of Harvey was free from any equitable claims of the complainant, was abandoned by the appellants. In the appellants' argument in this cause they admit that the complainant is entitled to relief, but deny that such relief should be in giving him bonds in the I., I. & I. R. R., according to the plan of the reorganization between the bondholders and Cushman. They deny that the relief he is entitled to is in paying him thirteen three hundred and ninety-eighths of the purchase money Harvey got for the property from the syndicate or construction company. They claim that the only relief he is entitled to, if any, is thirteen three hundred and ninety-eighths of the stock that

Harvey took in the construction company, subject to the payment of a *pro rata* share of the expenditures of Harvey.

Upon a final hearing upon the bill, the amended and supplemental bill of complainant, and the separate answers of Joel D. Harvey, John C. Cushman and the Indiana, Illinois & Iowa R. R. Co., to the bill and supplemental bill, and upon the proofs and testimony, the court below found the equities in favor of the appellee; that he was the owner of thirteen of the bonds and coupons thereto attached, of the Plymouth, Kankakee & Pacific R. R. Co. and secured by the mortgage and trust deed described in the bill, and that the last named company had issued and sold three hundred and ninety-eight of said bonds and that appellee became the owner of thirteen of them as charged in the bill; that the said Cushman was empowered by power of attorney to be complainant's trustee to purchase the property and franchise described in the mortgage, at a sale to be made under decree of foreclosure, for the benefit of appellee and the other bondholders as charged in the bill; and that the said Cushman purchased the same as trustee of the said complainant and the other bondholders charged in the bill.

The court further found that the appellant Harvey became the owner of the majority of the said bonds issued and sold as aforesaid, and entered into a fraudulent conspiracy with the appellant Cushman to defraud complainant and other holders out of their interests and said property rights and franchises, and to convey the same to their use, to the exclusion of the appellee. And in the execution of said conspiracy appellant Cushman in collusion with appellant Harvey, sold and conveyed to the Indiana, Illinois & Iowa R. R. Co., by a quit-claim deed, the said property rights and franchises of the said Plymouth, Kankakee & Pacific R. R. Co., and also made and delivered a quit-claim deed of the said property to Spies, Holt and Comstock, who subsequently quit-claimed the same to the Indiana, Illinois & Iowa R. R. Co. as alleged in the bill.

The court further found that the appellants, Harvey and Cushman, received from the Indiana, Illinois & Iowa R. R.

Co., in consideration of the said conveyances, the sum of \$150,000, no part of which was paid to appellee, who, after deducting \$4,000 paid to buy up the mechanic's lien thereon, was entitled to his *pro rata* share of said sum and interest thereon.

The court further found that at the time of the conveyances by said Cushman aforesaid, of the said property rights and franchises, the value thereof was \$150,000, and that appellee's equitable interest therein was thirteen three hundred and ninety-eighth parts of said trust estate vested in said Cushman as aforesaid, and the bill of complaint was dismissed as to Spies, Holt and Comstock.

And the court rendered a money decree against appellants, Harvey and Cushman, in favor of appellee, for the sum of \$7,057.80 and costs of suit, being his *pro rata* share aforesaid, and the suit was also dismissed as to the Indiana, Illinois & Iowa R. R. Co.

And thereupon the said Joel D. Harvey and John C. Cushman excepted to the said decree and prayed an appeal to this court, which was granted.

Messrs. H. K. WHEELER and G. W. & J. T. KRETZINGER, for appellants.

Mr. THOS. P. BONFIELD, *pro se*.

The first point made by the appellants in their argument is that the plan for reorganization of this railroad, adopted by the bondholders and Cushman, was void, because it provided for an issue of bonds amounting to \$3,750,000 and a second mortgage of \$2,000,000, while the P., K. & P. R. R. mortgage issue was only \$3,600,000, (what connection is there between these two facts?) and that before a railroad company can issue bonds it must appear that the money to be received shall be applied for the purpose of the corporation; that the issue of bonds is prohibited, except for money, labor or property actually received and applied for the purposes which such corporation was created; citing Article 11, Section 12, of the Constitution of 1870.

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The provision of the constitution has received a construction in the case of *P. & S. R. R. Co. v. Thompson*, 103 Ill. 187, in which it was held that it was intended in this provision that "No railroad corporation shall issue any stock or bonds except for money, labor or property actually received and applied to the purpose for which such corporation was created;" and that "all stocks, dividends and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting on the market bonds or stocks that do not and are not intended to represent money, or property of any kind either, in expectancy—the stocks or bonds, in such case, being entirely fictitious. That it was not intended to interfere with the customary methods of railroad companies to raise money, by the issue of bonds and stocks, for the purpose of building these roads and accomplishing the legitimate purposes of the corporation.

LACEY, J. The main point urged by appellants for reversal is as follows, to wit: Because the original plan of reorganization was contrary to the law and void; because the original plan of reorganization long prior to the year 1881 had been abandoned with the knowledge and consent of appellee; because the conveyance from Cushman to the I. I. & I. R. R. Co. was made with the knowledge and consent of the appellee; that appellee had agreed to put in his bonds on the same basis as the appellant Harvey; because the charge of fraud made in the bill against appellants in making the sale was not sustained; because appellee agreed to and requested, in case of sale of the P., K. & P. road, that he should have from the purchasers just what the other bondholders would get; because the court erred in permitting the appellee to elect to abide by the sale in part and disaffirm it as to the consideration received for the property; because the demand made for the bonds was made after the fixing of the original and amended bills, and the sale and transfer of the road to the I., I. & I.

R. R. Co. took place before the filing of those bills; because the relief granted could not be had under the prayer for general relief.

We will consider these objections in the order named. And first, we do not regard the plan of reorganization void under our constitution. The question appears to be settled by the Supreme Court in the case of P. & S. S. R. R. Co. v. Thompson, 103 Ill. 187. In that opinion the court gave construction to the provision of the constitution which provides that "No railroad corporation shall issue any stock or bonds except for money, labor or property actually received and applied to the purpose for which such corporation was created," and that "all stocks, dividends and other fictitious increase of the capital stock or indebtedness of such corporation shall be void." And it was there held, in substance, that the bonds may be sold by the railroad company for money to build a road or effectuate other lawful objects, and that railroad companies have a right to dispose of their bonds for a present consideration and for a corporate purpose, and, in such case, if the railroad company should subsequently divert the proceeds of the bonds to other than corporate purposes, the purchaser of such stock or bonds who has acted in good faith in the matter can not be affected by the subsequent misappropriation of the company.

We find no proof in this case, under this view of the law, that would render void the appellee's bonds; besides it comes with bad grace from the appellant Harvey, who has received \$150,000 for bonds similarly issued and partly in consideration of appellee's bonds, to make such a point against appellee. He has received value for appellee's bonds and should respond to him for the amount.

As to the point that the original plan of organization had been abandoned, we can only say that while that may be so in one sense, yet as long as appellant Cushman held the title to the original railroad property, purchased in as the trustee of appellee, who was to have a certain share in it proportioned to the bonds he held, the appellant could not be heard afterward to say that the appellee had no interest in the property, and sell it for the benefit of Harvey and himself, and, in fact,

in all his transactions and dealings with the trust property, up to the time of the sale in July, 1881, he never attempted to repudiate in his correspondence with appellee the interest that appellee had in it.

As to the contention of appellants that the appellee knew of the intended conveyance to the I. I. & I. R. R. Co. in July, 1881, and gave his consent to it, and agreed to put in his bonds on the same basis as Harvey, we think it is not sustained by the proof. We think, clearly, that so far from the complainant having knowledge of it, the appellants took great pains to conceal the fact of the sale and the terms of it from appellee. And this brings up the question as to whether the appellants acted fraudulently in making the sale complained of, and we think of this fact there can be but little doubt.

It appears quite clear that Harvey, who was the holder of two hundred and fifty of the bonds, intended, when he made the purchase from Cushman of the property in question, for the benefit of a railroad company to be organized, and with whom the Western Air Line Construction Co. was to make a contract for construction, in which construction company he was chief stockholder, procured by the sale of the property held by Cushman, to appropriate the whole benefit and profits arising from the completion of the road to his own individual use, to the entire exclusion of appellee.

And it further appears that Cushman was well aware of this intention and was aiding and abetting Harvey in carrying it out.

It further appears from the contract of indemnity taken by Cushman from Harvey and others, and other proof, that it was the intention to compel appellee to accept \$50 on the thousand for the bonds which he held.

The letters received from Cushman and Harvey by appellee after the contract for the sale of the road had been made in New York, in 1881, made misleading and fraudulent statements in concealing the fact of the proposed sale; and for a long time afterward the sale was concealed from appellee, showing, as we think, conclusively, that there was no honest intention on the part of the appellants to give the appellee the benefits of the sale.

Nor is it a sufficient excuse for appellants to claim as a reason for concealing the sale from appellee, that he was engaged in building a rival line. Even if the proof showed that appellee would have been hostile to the proposed sale, which we do not think it does, certainly after it had been accomplished, and the deed made out, there could have been no further excuse for any further secretion and tortious conduct on the part of appellants.

It is claimed that appellee requested the sale of the P., K. & P. road, and that he should have from the purchasers only what the other bondholders would get. If this were so, it could in nowise excuse appellants from fraudulently selling the road and converting the proceeds to their own use.

We do not understand that the appellee, in taking his decree in this case, must affirm the sale, so as to compel him to take the stock in the Western Air Line Co. He is proceeding to recover on a different ground, that of the fraudulent conversion of his property.

Nor was it necessary to make any demand for bonds; and the fact that he did make a demand at one time did not deprive him of his other legal remedies.

The last point raised by the appellants is, that the allegations in appellee's bill, to authorize him to receive a money decree under the prayer of general relief, are not sufficient. We think there are sufficient allegations in the amended bill upon which to base such decree. It was charged in the amended bill that the appellants conspired to and sold the property, which, the proof shows, cost \$750,000, and conveyed it away to the I., I. & I. R. R. Co. and Spies, Holt and Comstock, and the evidence shows appellant Harvey received money, stock and bonds, and property consideration for the sale, which he kept and used, and converted the same to his own use. A *cestui que trust* is entitled to the value of the property taken by trustee or converted to his own use, or by others, from the trustee, with knowledge of the trust. *G. S. & S. R. R. Co. v. Kelly*, 77 Ill. 435.

It is claimed that the evidence does not show that the value of the property sold by appellant Cushman was \$150,000.

We think the evidence was abundant to show that it was worth that amount.

Appellant Harvey purchased it of Cushman and put it into the Air Line Construction Co., at a valuation of \$150,000, and took stock in payment in that company for the amount.

The entire amount of the stock of the Air Line Co. was \$1,000,000, and the other stockholders of the company put in cash to the amount of \$850,000, and the amount of the work done on the road sold and the money expended was \$750,000.

We think that appellant Harvey, allowing for all losses and depreciation in the work done, and money expended on the old road, and from the fact that \$850,000 in cash was put into the enterprise by other parties, and the stock of the company taken at par, had a right to believe that his stock was also worth par, and since he converted it to his own use we think he ought to be compelled to account to others interested in it for the stock at par, he having accepted it as cash. And the fact, if it be a fact, that it afterward turned out to be of less value, could not be set up as an excuse for not accounting for it at par.

The rights of appellee should be fixed at the time of the conversion and not by what afterward happened. Harvey claims the stock has been worthless for some time, but a hundred and thirteen miles of the road have been completed and dividends earned, and the Air Line Co. has finished its enterprise, divided profits, and it is quite natural that the stock would now be worthless.

The evidence does not inform us on these points. The appellants failed to produce any evidence to show that they did not receive \$150,000 on account of the Air Line stock.

As Harvey took the Air Line stock for \$150,000 on his own account at par and fraudulently converted it, we think, under the circumstances, he should be debarred from denying that it was not worth what he took it at.

A point is made that Cushman is not jointly liable with appellant Harvey. We think clearly he is. He was an aider and abetter in the transaction, violated his trust and engaged in a fraudulent conspiracy to wrong appellee, and besides took an indemnifying bond from Harvey to save and keep himself

harmless from any damage that might occur to him on account of violating his trust to other stockholders not considered in the sale.

The court below, as we think, did not err in allowing the \$4,000 paid by Harvey to extinguish the Nichols title acquired under foreclosure proceedings of a mechanic's lien.

This was brought in for the benefit of the whole title and the appellee should stand his share of the expense.

Appellant Cushman was not entitled to any allowance for costs and expenses, he having violated his trust.

Seeing no error in the record of the court below the decree is affirmed.

Decree affirmed.

THE KANKAKEE STONE & LIME COMPANY

V.

STEPHEN UGROW.

36 448
91 135

Sales—Warranty—Question for the Jury—Instructions.

1. In an action for breach of warranty in the sale of a chattel, it is a question for the jury whether there was a warranty and a breach thereof.

2. In such action where it is sought to establish a warranty by implication from the use of general expressions, an instruction that the jury must believe that it was intended to make such a warranty by the use of general words, is proper.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. STEPHEN R. MOORE, for appellant.

Mr. H. K. WHEELER, for appellee.

C. B. SMITH, J. This suit is brought by appellant to recover damages for an alleged breach of warranty on the sale or trade of a mule to appellant by appellee.

Appellee had a little old mule, "all bunged up," which he

traded to appellant for wheat; appellant supposed it to be a good, sound mule, weighing 1,060 pounds, and gave him \$50 to boot. The mule which appellant traded for got sick very soon after the trade, with dropsy of the chest, and died in two weeks. Appellant claims that appellee warranted the mule to be sound when he traded, and that she was not in fact sound, but that she was laboring under the disease of which she died when the trade was made. The only witnesses to the trade and its terms were Laporte, for the company, and Ugrow, for himself. Laporte swears that Ugrow warranted the mule to be sound. Ugrow denies that he made any warranty, or used any words that in law would amount to a warranty. Whether there was a warranty or not was a question of fact for the jury. It was for them to say which one of these two witnesses they would believe. But even if there was a warranty, then the plaintiff was bound to prove that the mule was sick or unsound when he bought her. The only appearance of unsoundness of the mule at the time of the trade was some swelling of her legs, which all parties then seemed to understand was caused by standing on the stable floor.

The evidence, on behalf of appellee, that there was nothing the matter with the mule at the time of the trade, is quite as strong as the evidence for appellant that the mule was not sound. At all events it was a question of fact for the jury, which they have found against appellant, and we can not say they erred in that finding.

Appellant also claims the court erred in modifying one of its instructions. The modification complained of simply informed the jury that, in cases where no express and formal warranty was made, and when it was sought to have the jury imply a warranty from the use of general expressions, in such cases the jury must believe from the evidence that the defendant intended to make such a warranty by the use of general words. This modification was right, under the claim made by the plaintiff and under the evidence before the jury. *Ender v. Scott*, 11 Ill. 35; *Adams v. Johnson*, 15 Ill. 345.

There is no error in the record and the judgment is affirmed.

Judgment affirmed.

36	450
140s	50
36	450
58	186

THE JOLIET, AURORA & NORTHERN RAILWAY COMPANY

v.

A. A. VELIE.

Railroads—Personal Injuries—Defective Appliances—Contributory Negligence—Evidence—Question for the Jury—Excessive Damages.

1. In an action against a railroad company for personal injuries, it is held that the questions of negligence and contributory negligence were for the jury.

2. It is also held that a verdict of \$14,000 for the plaintiff was not excessive.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

This action was brought by the appellee to recover damages for personal injuries received by being run over by the engine of the appellant while in its employ as conductor and acting brakeman, while in the line of his duty in uncoupling the engine from the freight cars. The gravamen of the action is the alleged negligence of appellant in various particulars set out in the declaration, all but one of which we deem it unnecessary to notice, as in the view we take of the case there was no evidence that any of those acts of negligence, save the one which we will notice, was the proximate cause, or cause in a legal sense, of the injury complained of.

The allegation of negligence set out in the declaration, upon which the right of recovery if sustained by the proof alone hinges, is as follows: That it was appellant's duty to have on each car of the trains an appliance, commonly called a hand-rail, in good repair, to reasonably protect employes engaged in operating trains, and also to furnish employes to inspect cars and see before they were permitted to run over the said

road that they were provided with proper appliances to protect employes handling such cars. The foregoing are the only material allegations that, we think, the evidence could by any consideration of the law in such cases sustain. The circumstances of the accident or injury and the surroundings, as shown by the evidence, seem to be about as follows: The appellant's road was about forty miles long, extending from Joliet to Aurora, Ill.; the track laying was finished, but the blasting and surfacing had not been completed, and work on them continued till after the accident and until May, 1889. The road owned no equipment except one locomotive and one combination passenger and baggage car; its business was in the transfer of freight cars from other roads between Joliet and Aurora, with such incidental passenger traffic as might happen to arise. The appellee was employed by the appellant through its superintendent, Evans, as conductor, at \$75 per month, commencing August 17, 1886. His business was to run a mixed train consisting of freight and passenger coaches between Joliet and Aurora, making two trips a day each way, his being the only train on the road. There was no turntable at Aurora, and this necessitated running the engine backward from Joliet to Aurora, or from Aurora to Joliet. The only railroad employe at Aurora was a station agent who had nothing to do with making up the train, only to tell appellee and his brakeman what cars were to go. The appellant had no yard at Joliet at the time of the injury. The Chicago and Alton R. R. Co. did the switching. It made up the trains and appellee and his brakemen would couple on with the engine. Appellee was the first of appellant's men who had anything to do with the cars. The train was made up for them from cars brought from other roads to take out. Appellee had nothing to do in making up the trains at Joliet; that was done by the Chicago & Alton R. R. Co., which did all the terminal work in every shape and manner, including the making up of trains. Appellee's orders were to go and get the bills and take his trains. The train crew with appellee consisted of his engineer and fireman and one brakeman. The engine that hauled the train April 22, 1887, the time of the

accident, was provided with a foot rest on the right side, but none on the left side of the pilot or cow catcher. At Plainfield, a station between the two terminal points of the road, there were two side tracks, one on each side of the road. It was appellee's practice to do all the switching at Plainfield, because most convenient. On the afternoon of April 22, 1887, appellee as usual left Aurora on his return trip to Joliet at about 4:15 o'clock P. M., with three freight cars and a combination coach.

The engine was backing toward Joliet with its nose or pilot against the foremost freight car. This car belonged to the Hoosac Tunnel Line No. 8221; it had previously come over appellant's line from Joliet some time before the accident, loaded with coal. At Plainfield it was desired to rearrange the train.

In the operation No. 8221 was to be temporarily detached from the engine and backed in on the side track, to be afterward hauled out in a different position to the other cars. The engine accordingly pushed the car back onto the switch at the south side of the main track, and when it had gone far enough, appellee stepped between the car and engine to draw the coupling pin and allow the engine to return to the main track, and his own account of the occurrence is as follows: "As the cars passed me I looked to see that everything was all right, and I saw that everything was all proper and as it should be, and I stepped up to cut the car off. I had to look to see where I was going, so as not to stumble when I went to uncouple, and as I reached for the hand-rail on the car, my hand fell down from it; that threw me off my balance; then the pilot got me on the ankle and shoved me along on the rail." "I was taking all the care I could." "This rail was not in good condition; it was not in proper shape, because I put my hand out to get hold of it, and it was flattened in so that I could not grasp it. If it had been in proper shape there would have been no trouble at all about my grasping it. It was smashed in close against the car. It looked all right, was not bent down, but was smashed against the car. I reached for it, but could not get my hand on it,

and so lost my balance and went down." On cross-examination he testified: "The train, when I fell, was on the side track. When I fell, I was just stepping over the rail to reach for the car. My foot was on the ties and I was looking to see where I was stepping. I think my stepping over the rail and reaching out my hand were simultaneous, and when I failed to grasp it, my hand fell down and I lost my balance. If the hand-rail had been in sound condition, I do not think the accident would have happened."

The evidence abundantly shows that the hand-rail was out of repair and in such a condition that it could not be grasped by a man's hand, so close was it jammed in against the car, and that the defect appeared to have been there some time. This hand-rail was about five feet above the ground.

As to the hands furnished appellee and equipment, he testified as follows, viz.:

"On the day I was injured I was handling four cars—three freight cars and a combination baggage and passenger coach. I had one brakeman, a fireman and an engineer. To do the business that we were doing I ought to have had two or three men where they furnished me one. That one was a brakeman who had not been railroading any length of time. There should have been one brakeman and one man to attend to the baggage. I had, several times prior to the accident, called the attention of the superintendent to the fact that I needed more help. He had promised me that in a few days they would give me a man, as soon as business would pick up a little. I said, 'What more business do you want than we are doing; there are not men enough to do the work now. 'Well,' he said, 'I will give you a man after a little.'

"Not having that man compelled me to do brakeman's work to get along and make time. I had to couple and uncouple cars, as a brakeman would do. The extra man had not been furnished when I was hurt. The first time I got out after I was hurt was in September, and they had two brakemen there then."

The injury received by appellant was very severe; the flesh on the leg was shoved up and pushed back so that the

bone stuck out, and the foot was crushed. He was crushed in the chest and the ribs were torn loose from the breast bone. He has suffered amputation four different times. The ribs have never been united and are yet loose from the breast bone. He is incapacitated from ever doing any labor, and has suffered great pain. He is, in fact, a perfect wreck, his nervous system is so shattered.

At the close of appellee's evidence, the appellant made a motion to have the evidence introduced excluded from the jury, which the court overruled, and appellant excepted.

The jury returned a verdict against appellant for the sum of \$14,000. The appellant made a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict, from which judgment this appeal is taken.

Messrs. WILLIAMS, HOLT & WHEELER, and M. O. SOUTHWORTH, for appellant.

Messrs. A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, for appellee.

LACEY, J. The only points which the appellant insists upon as error, are, first, the court overruled its motion to take the case from the jury, and, second, in overruling the motion for a new trial on the ground that the verdict was contrary to the evidence and not supported thereby.

It is not seriously contended that appellee was not in the exercise of ordinary care at the time of the injury, but it is insisted that he entered and continued in the service of the appellant after knowing all the defects in the appliances and machinery and dangers in the requirements of the service which he engaged to perform and therefore took the risk of all accidents and injuries arising to himself on account of any such known defects. And it is contended that by reasonable care and diligence he might have been informed of such defects and dangers and is, therefore, held to notice. This is undoubtedly the law and should be kept in mind in determining the right of the jury to return a verdict against the

appellant, although no strictly legal question is raised by any instruction. See *Penn. Co. v. Lynch*, 90 Ill. 333. It is contended by appellee's counsel that a case should not be taken from the jury where there is any evidence tending to establish the allegations of the declaration. This is no doubt the law, provided the court can say that the evidence reasonably authorizes the jury to find the issues in the direction in which the proof tends. If the trial court would feel bound to set aside the verdict then the proof is not sufficient. *Simmons v. C. & T. R. R. Co.*, 110 Ill. 340. It is no doubt the duty of a brakeman and others having charge of a train to inspect it and see that the cars are in good running order and everything in repair to the same extent that it is the duty of the company so to do. *C. & A. R. R. Co. v. Bragonier*, 119 Ill. 51; *C., B. & Q. R. R. Co. v. Warner*, 123 Ill. 38; *Same v. Same*, 108 Ill. 538.

It is the rule of law also, that "it is primarily the duty of the company to provide good, safe and proper machinery so far as skill and diligence can construct it; but when that duty has been once performed it is a duty devolving on the servants operating it to observe that it is in safe repair," etc. *C. & A. R. R. Co. v. Bragonier*, *supra*. The above, we think, is a reasonable statement of the law, which must be considered in determining whether the evidence reasonably supports the verdict after allowing the jury every intendment in its favor.

We will now consider the evidence as bearing upon the point we regard as the vital one. In the first place, we will premise by saying that we can not regard the failure of appellant to furnish other brakemen as the cause of the injury. That fact may have been the cause of the appellee being compelled to do braking at all, but the fact that he did the coupling and braking did not reasonably imply injury, no more than would the fact that appellee was in the appellant's employment. It may have been the cause of the cause, but in law can not stand for the cause of the injury. The fact that there was no step on the left hand side of the pilot can not be allowed to assist plaintiff to recover. For, first, that did not appear to be the cause of the accident, and,

secondly, if it had anything to do with it, it was as well known to the appellee as anything could be, for he had run the engine for several months. We are well satisfied that the evidence justified the jury in finding that the hand-rail being out of repair and mashed in was the cause of the injury. We also are of the opinion that the jury were justified in finding from the evidence that such an appliance, kept in good order, was reasonably necessary in order to prevent injury to those operating the train, and that it was usual to attach them to cars and that the appellant was negligent in not having the hand-rail in good repair. We can not see, either, why this defect might not be considered by the jury in the light of a defect, the same as though the car had been made by the appellant without any hand-rail or with one improperly constructed; for it appears that the car came into appellant's hands in the shape it was, or, at least, the evidence so tends to prove, and it would be the same as though purchased for its own use. At any rate, the jury were justified in holding it was negligent in not giving the car the necessary inspection, and in not repairing it. As to appellee having notice or being held to notice, we will observe that he had no notice of the defect and had no notice that appellant had no inspector of cars, but thought it had. We do not think the appellee can be said to have been in service of the appellant with knowledge that it was receiving cars in bad repair and dangerous to life and limb. The C. & A. R. R. Co. acted for appellant in receiving the cars at Joliet and making up the train, and we think the jury might find from the evidence that it had the duty of inspection as well. When the cars were hauled by appellee to Joliet, the train being made up, it was not necessary to examine the cars to find whether the hand-rails were all right. All he had to do was to couple on his engine and haul them to Aurora and there leave them, and when, afterward, he took them back again, he had no occasion to examine them till he reached Plainfield. Besides, when he started from Aurora he had the baggage to look after, and other duties of the conductor, and it may be that the brakeman coupled the cars. The jury had a right to take all the

circumstances and the position of appellee into account in determining whether he was so negligent in his duties as that he should be held to knowledge of the defective hand-rail. It does not follow, as a conclusive fact, that appellee should be held to notice of the defective hand-rail because the car was in his charge, though there are some strong expressions in the opinion in *C. & A. R. R. Co. v. Bragonier*, *supra*, that might lead one so to suppose. We do not think that the court there so held. It was treating of certain instructions held to be erroneous. And it is quite clear that it was not so intended when *C., B. & Q. R. R. Co. v. Warner*, *supra*, is considered, for in that case Warner was conductor of a freight train, a part of his duties being coupling and uncoupling, and, though his injury was caused by reason of the want of a hand-rail on one of the cars in his train, the jury returned a verdict in his favor, and it was upheld by the Appellate and Supreme Courts.

This could not have been if the mere fact of his having charge of the train held him to notice of the want of the hand-rail.

The jury must have found, under the circumstances, that he was not negligent in not discovering the defective hand-rail, for this was submitted by instructions and was necessarily involved. In this case we think the jury had far better reason for finding their verdict, acquitting appellee of negligence, than in the other. All the questions of fact have been submitted to the jury and we fail to find, after a careful review of the evidence and full consideration of the arguments, that it was not justified, or that the court erred in not taking the case from the jury on appellant's motion.

We have also considered the objection that the verdict is excessive and are compelled to also hold that point against appellant. While it appears on the one side quite a hardship on appellant's part to be compelled to pay so large a sum for what its counsel appears to consider a trifling fault, yet when we consider the hopeless and forlorn condition of appellee, his hardship seems much greater. It only illustrates how great calamities result from trifling causes. Hundreds may

be killed on account of the omission of watchfulness and care, and we see no better way than to hold the guilty party responsible for its lack of duty. The appellant's road was no doubt weak and poor, as it appears to have been run on too economical a principle for safety to its employees and to the public. The loss, where the employees are not in fault, should fall on the party in fault.

We can not think that the amount is more than just compensation. Appellee was a man in the prime of life, only about forty-five years old, capable and efficient in his occupation, and could command a good salary. He had been employed not long before for \$100 per month and appeared to have bright prospects before him. Then, if he is to be allowed compensation for any pain and suffering, which the evidence shows was intense and of long duration, we can not see wherein he has been over-compensated. Seeing no error, the judgment of the court below is affirmed.

Judgment affirmed.

SMITH, J., dissenting. I can not give my consent to this judgment, for three reasons:

First. From the appellee's own statement, he was guilty of gross negligence in stepping between the engine and the car while it was in motion to uncouple them, and that, too, upon a road which was unballasted, and when he could not walk without stepping upon or between the railroad ties that had no filling between them. It would be difficult to imagine a more dangerous or reckless act than stepping before a moving engine to uncouple the car to which it was attached. It was also an act of negligence on the part of appellee in not looking to see whether there was a hand-rail attached to the freight car before reaching for such rail. If he had given the slightest attention to his protection, he would have seen the rail was out of order and that he could not get hold of it.

The Supreme Court and this court have held, in a multitude of cases, that an attempt to get off a moving train is such an act of negligence as will prevent a recovery when accident follows such attempt, and how much greater was the neg-

ligence on the part of appellee to step before a moving engine when the slightest misstep would involve him in almost certain death. It is hard to imagine a more reckless act of an intelligent human being. The law does not require railroad companies to send or keep a guard or watchman over its employes to guard them from getting hurt. Every person in the employ of a railroad company, from the highest to the lowest, are but servants in the service of an intangible lifeless thing, called a corporation, and, therefore, from very necessity, every servant must be watchful and careful for his own safety, and must not expose himself recklessly to any kind of danger. The enforcement of this rule is of the highest importance to employes in railroad companies, and also to the public, whose lives and property so largely depend upon the watchfulness and care of those operating the railways of the country.

In this case, appellee was the master of his own train. He had a right to require the engineer to stop his engine before going before it. No one had a right to command him to go into a place of danger, nor was there the least possible necessity of his going before a moving engine to do this work he was doing. It was purely voluntary on his part and wholly unnecessary. The danger was apparent to the most thoughtless, and in the presence of this known danger he did not so much as raise his eyes to see whether there was any guard rail on the car which he could reach or hold to while uncoupling the car. I can not imagine any greater degree of negligence, short of throwing one's self headlong before a moving train.

Second. If the methods adopted for running appellant's train were dangerous and hazardous to its employes, either from a want of sufficient help or from a new or bad road track, or from dangerous machinery, and with a full knowledge of these dangers and hazards the appellee remained in the service of the company, then, under the settled and repeated decisions of this and the Supreme Court, he could not recover for an injury resulting from such dangerous methods of operating the road, or from an insufficient road or defective machinery.

If he saw fit to continue in the service of the company with insufficient help, a defective road or machinery, and under

methods of operating his train that were manifestly dangerous and hazardous, then he must be held to have assumed the risks of continuing in such place of danger. This rule is so well settled that it needs no citation of authorities.

Third. I hold the damages are excessive in the extreme. While there is no doubt that the injury to appellee was very severe and lasting in its character, and that he has suffered very greatly and is maimed for life, still, I am constrained to believe that the verdict is largely the product of sympathy on the part of the jury for the appellee. The amount only lacks one hundred dollars of being three times as much as the law allows to be recovered for the death of the most useful or exalted citizen of the State. The interest on this amount at the current rate of eight per cent per annum, amounts to \$1,120, and leaves the principal untouched. This is \$220 more per annum than appellee was earning at the time of this injury. It seems to me that sympathy for this worthy and unfortunate man has blinded both the court and jury to plainest principles of law, rightly applicable to and governing the case, and that this verdict has no support either in the evidence or the law.

38 460
137* 123

ROBERT H. TINKER

v.

THE CITY OF ROCKFORD.

Railroads—Eminent Domain—Damages—Estoppel—Municipal Corporations—Pleading.

1. A deed of land to a railroad company for its location bars the right of the grantor to sue for damages to the remainder of his land by reason of lawful constructions by the company which are necessary and incident to the operation and maintenance of its road.

2. The replication "*de injuria*," is not proper where the plea sets up some authority in law which is *prima facie* a legal defense.

3. A replication, which is argumentative and does not take issue with the allegations of the plea, but simply attempts to set up matter which should have been alleged in the declaration, is demurrable.

Tinker v. City of Rockford.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Winnebago County; the Hon. JAMES H. CAETWRIGHT, Judge, presiding.

Messrs. WARNER & ANDREWS and L. C. JACOBY, for appellant.

Appellant claims the incidents the grant of himself and wife was accompanied with, were such as were essential to its enjoyment at the particular time of the grant, having reference to the then surroundings, and in the absence of a provision in the deed covering future injuries outside the grant, and independent of the grant, appellee's claim can not stand. A demurrer to declaration was overruled properly in the light of the following authorities: *Provision Co. v. City of Chicago et al.*, 111 Ill. 651; *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago et al. v. The Union Building Association*, 102 Ill. 379; *Patrick H. Stack v. The City of East St. Louis*, 85 Ill. 377; *Schneider v. City of Detroit*, (Sup. Ct. of Mich.) Vol. 40 N. W. Rep. 328; *City of Olney v. Wharf*, 115 Ill. 519.

While holding city not liable in that particular case, approves the former cases. *Railroad Co. v. Hartley et al.*, 67 Ill. 439; *Railroad Co. v. City of Chicago*, 121 Ill. 176 and 186; *Railroad Co. v. Ayers*, 106 Ill. 511.

The Illinois cases cited are believed to be in all respects harmonious with the New York Elevated Railroad cases which are: *Story v. New York Elevated Ry. Co.*, 90 N. Y. Appeals, 122 and 198; *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. Appeals, 268 and 269; *Drucker v. Manhattan Ry. Co. et al.*, 106 N. Y. Appeals, 157-65.

In a somewhat similar case to that at bar, a conclusion was reached, after an exhaustive presentation, that the railroad company, and not the city, was liable to the plaintiff. *Burritt v. Railroad Co.*, 42 Conn. 174, 203.

It is settled doctrine that, upon a voluntary conveyance of land for railroad purposes, no more and no less will be comprehended therein than would have been involved had the same lands been taken, for the same purpose, by compulsory process.

It is also well settled that a railroad corporation existing under the laws of this State can build where it will between streets of a municipal corporation; but when it comes to crossing public streets, it can not do so without having obtained municipal assent therefor. *Railroad Co. et al. v. Dunbar et al.*, 100 Ill. 110.

The city is under no duty which could be enforced by mandamus to permit a railroad corporation to lay its tracks and operate its road over and across public streets. How a railroad company will get through a city is, so to speak, a matter of municipal grace. It must make the best terms it can with the city council; and, as a matter of daily experience, it seldom has trouble in getting most desirable terms. It is well settled law that where a deed of conveyance describes the premises by precise metes and bounds, such description is to govern in a construction of rights which flow from such deed; and courts are not at liberty to go outside and guess and speculate as to what parties intended, who have explicitly stated, in writing, what they intended. The reason for this manifestly is that the court, in attempting to speculate, conjecture or guess, might make a mistake. It is equally well settled an easement, appendant or appurtenant, and therefore incident to an estate, must have one terminus on the land of the party claiming the easement—it must inhere in the land, concern the premises and be essentially necessary to their enjoyment; they are in the nature of covenants running with the land. *Garrison v. Rudd*, 19 Ill. 558.

We suppose it is also well settled law that the damage to remaining premises must be such as have their origin in, and flow from, the use of the premises taken for railroad purposes, and not such as have their origin in, and flow from, a purpresture beyond the owner's premises, or any other like extraneous circumstance.

It is also undoubted law that the land owner, on a conveyance which discloses by its terms, or by implication of law, that it was made for railroad purposes, consents that the premises granted may be filled with railroads, and non-actionable fires set therefrom upon his remaining lands, and all the incon-

Tinker v. City of Rockford.

conveniences incident to railroad operations within the limits of his grant are to be submitted to, if they are ordinary incidents of railroad operation, without recompense. But when it comes to aiding a railroad to extend its operations outside of and beyond the limits of the grant, an entirely different question arises. The enjoyment and use of the premises granted, and the enjoyment and use of a railroad outside of the limits of the premises granted, are entirely distinct matters.

A mere convenience is not sufficient to create, or convey, a right or easement, or impose burdens on lands other than those granted, as incident to the grant; in all cases the question of necessity controls. *Howell v. McCoy*, 3 Rawle (Pa.), 256; *The St. Louis Bridge Co. v. Curtis et al.*, 103 Ill. 410; *Washburn on E. & S.* (4th Ed.) par. p. 163, top p. 258.

Messrs. MARSHALL & TAGGART, for appellee.

The damages sued for would have been embraced in the damages awarded in a condemnation suit, for these reasons: In so far only as plaintiff had an appurtenant right in Winnebago street can he recover. The right alleged to have been invaded was one appurtenant to the whole of his original property, and the damages sued for would have been involved in a condemnation suit. No action lies for obstruction of a street except where plaintiff has an appurtenant right therein. *City of East St. Louis v. O'Flynn*, 119 Ill. 200; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; *Little v. City of Lincoln*, 106 Ill. 353.

Every decision upon this question is to the effect that such damages are embraced in condemnation proceedings. The following case is especially in point. *Sioux City R. R. v. Wiemer*, 16 Neb. 272; 20 N. W. Rep'r, 349.

The Supreme Court of Massachusetts has said of over-head crossings and approaches, under statutes in legal effect the same as ours, as follows:

"Hence it appears, that the raising of a common road, with an embankment of sufficient length on each side to form an easy slope to a high bridge, is a part of the franchise given by the charter, as much as the right to take private property, or

to pass over navigable waters. These bridges, and the embankment extending laterally therefrom, are as much a part of the structure authorized by the charter, as the railroad itself. This brings the case of *damned* by such structure within all the reasons and within all the provisions which give compensation for damages occasioned by the laying out, making and maintaining of the railroad." *Parker v. The Boston & Me. R. R.*, 3 Cush. 116.

In the same direction are: *Buckner v. C., M. & St. P. Ry. Co.*, 56 Wis. 403.

The law does not favor the splitting of actions. Whatever the form of suit, all damages must be recovered in one suit. *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203.

The appraisalment of damages in a condemnation embraces all past, present and future damages which the improvement may thereafter reasonably produce. *Mills on Eminent Domain*, Sec. 216, and cases cited; *C. & A. R. R. Co. v. S. & N. W. R. R. Co.*, 67 Ill. 142; *K. & E. R. R. Co. v. Henry*, 79 Ill. 290.

The conveyance of land to a railroad company by ordinary deed, without condition, is in law a conveyance of a right to do whatever is lawful in the construction and operation of the railroad.

A conveyance authorizes everything that a condemnation would authorize. At common law the right to take was without compensation, and at the will of the sovereign power.

Constitutional limitations require just compensation to be made. This must be ascertained by agreement, if possible, and a petition for condemnation can be filed only in case of disagreement. Surely the agreement or deed should have as broad a scope as the substitute for agreement, that is, condemnation proceedings.

Pierce on Railroads, 133, states the rule as follows: "A deed of land to the company for its location, is presumed to include a license to do whatever is lawful in the construction and management of its road, to the same extent, and with the same effect, as if the land had been compulsorily taken; and it is therefore construed to release a claim for injuries to the land of

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grantor, or for other damages to which he would have been entitled if the land had been taken by proceedings *in invitum*."

The author cites *Norris v. Vt. Cen. R. R. Co.*, 28 Vt. 99; *Rood v. N. Y. & E. R. R. Co.*, 18 Barb. 80; *Conwell v. Springfield & N. R. R. Co.*, 81 Ill. 232; *Hartsman v. Lex. & Cov. R. R. Co.*, 18 B. Monroe, 218, and *Booth v. Androscoggin R. R. Co.*, 51 Me. 318.

Rorer on Railroads, Vol. 1, 324, in the text, gives the rules of damages in condemnation suits, saying nothing specially about the effect of a deed, except in the last part of note 1, which reads as follows, to wit: "And this is so, too, when the right of way is acquired by purchase. *Ludlow v. Hudson Riv. R. R. Co.*, 6 Lans. 128; *Hartsman v. Lex. & Cov. R. R.*, 18 B. Mon. 218; *Hatch v. Vt. Cen. R. R. Co.*, 25 Vt. 49; *J. N. & S. R. R. Co. v. Cox*, 91 Ill. 500."

Hartsman v. Lex. & Cov. R. R. Co., 18 B. Monroe, 218, was a case where the depth of cut caused land outside of right of way to cave. The land for the right of way had been conveyed by ordinary deed. The land owner insisted that it was the company's duty to prevent caving, by wall or otherwise. The court held that the land having been conveyed to the railroad company for the construction of a railroad, the damages were released.

Rood v. N. Y. & E. R. R. Co., 18 Barb. 80, is to the same effect. Among other things, the court, on page 85, says: "It is a well known and reasonable rule in construing a grant that when anything is granted, all the means to attain it, and all the fruits and effects of it are granted also. *Shepherd's Touchstone*, 79; 9 Metc. 36."

As a railroad can only take for its corporate purposes, a grant to it must amount to a grant to build all lawful structures. The deeds in the cases above are all ordinary deeds similar to the one set up in the pleadings in the case at bar.

In *Norris v. Vt. Central R. R. Co.*, 28 Vt. 99, the plaintiff, at the time of the survey of the railroad, and before construction, conveyed to the company a piece of land by ordinary deed, and so far as the case shows, without any notice of what special use was to be made of it, but which the company ex-

cavated and used for the purpose of turning a river. We quote from the opinion as follows: "It is not claimed in argument that the act of turning the river by the defendant was in itself unlawful; and it is clear that, if the defendants are to be made liable upon the ground of negligence or want of care or skill in turning the river, by means of which the damage was caused, such case must be affirmatively made out. None is found by the referee, unless the law imposes the duty upon the railroad company to observe the action of the water from time to time upon the plaintiff's meadow, and to cast in brush and stones, as a prudent man would do to save his own land; or unless the company was bound as a matter of law to protect the banks of the river at all events so that the stream should not encroach on the plaintiff's land." See also *North and West Branch R. R. Co. v. Swank*, 105 Penn. St. 555.

In *Hodge et al. v. Lehigh Valley R. R. Co.*, 39 Fed. Rep. 449, it is said: "In other words, the railroad company has no right to exercise the powers conferred upon it by charter until it makes compensation, in some form, to the owner of the land which is taken, and over which the railroad is being constructed. The railroad company must agree with the owner of the land, or if that can not be done, then it must apply to the proper tribunal for the appointment of commissioners to assess the damages which are assumed to result from the construction of the railroad," etc.

And again: "Accordingly, a deed of conveyance was made by the plaintiff, conveying the land to the railroad company. The deed was executed and delivered, and was for a consideration stated in that deed. The consideration was accepted by the owner of the land, and it had all the effect then of the transfer of the right of the land owner, and an investiture of the right to construct this road, upon the railroad company, which the condemnation proceedings would have had, and embraced all the damage the plaintiff might have recovered by condemnation proceedings. It is not a mere partial release of the damage to which the owner of the land might be entitled which is provided for there, but the construction which the court gives to it is that it relieves the

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railroad company as effectually from the payment of the damages caused by the construction of the road as the perfected condemnation proceedings would have done. Whatever damages, then, would result necessarily from the construction of that road through the lands of the plaintiff were released to the railroad company, or rather the railroad company was released from all liability for them, just as effectually as if the land had been taken by the railroad company under the condemnation proceedings, and they embraced all damages necessarily resulting from the construction of the road, whether they were in contemplation of the parties or not."

The above case was one where the damages were claimed to result from changes made in a bridge years after the road, was first built.

In most of the cases above referred to the deed appears to have been an ordinary deed. In the case in 6th Lans. 128, there was an *habendum* clause limiting the use to railroad purposes.

Our statute in effect does the same, as it only gives railroad companies power "to purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation." Sec. 20, Chap. 114, Starr & C. Ill. Stats.

The limitation of the general incorporation laws as to real estate would probably have the same effect. Sec. 5, Chap. 32, Starr & C. Ill. Stats.

It is true that the purchase of real estate may give no indication of what use it is to be put to, but where a corporation is incorporated for a specific purpose, and is only authorized to buy real estate for that purpose, every one selling land to such corporation must know that the land is sold and conveyed to be used for such corporate purposes.

UPTON, P. J. The questions presented by this record arise from the pleadings, which are quite voluminous. The averments of appellant's declaration are, in substance, that he was the owner of a lot, number 3, in block 5, in Church & Robin-

son's addition to the city of Rockford, abutting on Winnebago street. That appellee, in 1883, had permitted some railroad companies to construct a viaduct in said street, thirty feet wide, twenty feet high and 800 feet long, north of appellant's premises, to permit cars and railway trains to pass under it in crossing that street, with a southerly approach thereto for the public use and travel on that street, and had fixed a grade of the street, and, in conformity thereto, appellant had, in September, 1884, erected three dwelling houses fronting upon that street, with basements, corresponding to the surface grade of the street; that the viaduct was constructed pursuant to the ordinances of appellee, and that the "fee" of the street was in the city of Rockford; that the doors and windows of the said dwelling houses, so erected, were fronting upon and faced Winnebago street. The grievances complained of are that in August, 1887, the appellee, by its ordinance, permitted the said viaduct to be further extended southward for a distance of 300 feet, and in front of two of said houses, so erected by the appellant, thereby obstructing the egress and ingress to and from the two north dwelling houses, to and from Winnebago street; that by the extension of the southerly approach to the viaduct, the grade of the street has been raised in front of appellant's two north dwelling houses, obstructing the light from the windows of those dwellings, causing dust and noxious substances to be blown into the windows and doors of the said dwellings, and greatly depreciating the rental and actual value thereof, and of great damage to appellant. It is further averred that the extension of the viaduct in 1887, in front of the dwellings of appellant, was not necessary, either for the public use and travel of Winnebago street, or for the corporate purposes of the city of Rockford.

The original declaration contained three counts. The second count was withdrawn by appellant by leave of court. The first and third counts were in substance alike. The appellee pleaded the general issue, and three special pleas thereto; to these special pleas appellant demurred, and the court

sustained the demurrer to the first and third special pleas, and held the second special plea good.

The plea to which the demurrer was overruled by the trial court was, in substance, that the Chicago, Madison & Northern Railroad Company, with lawful power so to do, with right to take and damage public property therefor by eminent domain, was constructing a railroad across lot three (3), described in the declaration, and across other lands of appellant adjoining it, and which constituted therewith one property, and across Winnebago street west from lot three (3), upon such a line and grade as had been theretofore established according to a survey theretofore made, and which line and grade so established was designated on grade stakes set up on its line of such survey, on the appellant's land, duly marked, showing such grade, which construction upon such line and grade was of such a character as to entirely cut off and stop travel on Winnebago street, unless a viaduct should be constructed therein, over and across the proposed railroad, at a great height, to wit, twenty-two feet above said street, so as to permit the passage of trains and cars thereunder, and public travel thereon, together with a southerly approach thereto; that the railroad company was about to construct its railroad so established, and the viaduct across Winnebago street (as a necessary incident thereto, which, by law, it was required to do, in the construction of its road), and in such a manner that appellant's lands were necessary to such construction, and so that appellant had a right to withhold his land until his damages for such viaduct were paid, and that appellant, with knowledge of the premises, before the committing of the grievances complained of, for the consideration of \$55,000, sold and conveyed to the railroad company, by deed, duly executed and acknowledged, a large part of the said lot three (3), describing the part, and other lands; which conveyance was so made for the purpose of enabling the railroad company to construct its railroad and all necessary adjuncts thereto, and all necessary structures therefor; that the railroad company did construct said viaduct in a proper and skillful manner, doing no unnecessary damage to the appellant, which is the grievance complained of.

Subsequently, and at the April term of the Winnebago Circuit Court, appellant by leave filed an additional count to his original declaration. In this count appellant avers that on or before the date of his deed of conveyance to the railroad company, above stated, December 29, 1886, he was the owner of the lot three (3) in question; that the lot abutted on Winnebago street, and on a level therewith; avers that on the 1st day of December, 1886, the appellee, having control of said street, by its ordinance authorized and permitted the Chicago, Madison & Northern Railway Co. to enter into possession of that street, and to erect a superstructure or approach to the southern end of the viaduct, then upon said street. And in pursuance thereof, the said railway company entered into possession of said street and obstructed the same in front of and along appellant's land, with such superstructure, by means whereof the tenants occupying the two north dwellings upon said lot vacated the premises, and appellant was unable to obtain other tenants therefor, and the same have become and are unproductive in consequence of the noise and confusion, falling of dirt and dust caused by the travel in the said street over the viaduct, and the value of said buildings is greatly depreciated; avers that said superstructure was not necessary for any purpose of public travel over said street; that the ordinance allowing such use to the railway company was passed November 30, 1886, and approved December 1, 1886, and sets out the ordinance.

It is further averred that the land purchased by the railway company from appellant was filled in some six feet in height within the railway company's right of way on both sides of Winnebago street, which filling elevated said viaduct and thereby prolonged the approach thereto on the south unnecessarily in front of appellant's said dwellings, and from no necessity of public travel upon the street or use for the corporate purposes of appellee, by means whereof the rental and market value of appellant's two north tenement houses situate upon said lot are permanently injured and damaged to the amount of \$3,000.

To this additional count, appellee filed the general issue and

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one special plea, in which special plea appellee sets out the same alleged facts in substance and effect, but more in detail, as it had before interposed in its second special plea to appellant's original declaration as above set forth. To this special plea appellant replied, "*de injuria*," and upon the filing of that replication appellee demurred, specially assigning as cause of demurrer, among other causes, that the special plea set up and stated a positive legal right in the railway company to erect and maintain the structures complained of in the appellant's declaration, and not mere matters of excuse. The trial court sustained the demurrer.

Thereupon appellant filed a special replication to appellee's second special plea to the first and third counts of the original declaration, and also replied specially several matters, by leave given, to appellee's special plea to the additional count of appellant's declaration, and joinder upon the appellee's plea of not guilty.

Both of the above special replications of appellant conclude to the country, and to each appellee interposed a special demurrer which the trial court sustained, whereupon appellant abided his replication and prosecuted this appeal.

Two questions are made upon this record by counsel for the respective parties, which we are asked to consider: First, were the pleas interposed to the original declaration and the amended count thereof, as pleaded, sufficient to bar a recovery; and second, were the replications filed thereto obnoxious to the demurrers interposed as held by the trial court.

First. It is a well settled rule of law that a city has absolute control over the grade of its streets; it can make the grade light or heavy, and elevate and lower it at pleasure, and adjacent lot owners can not call it to account for errors of judgment in these respects or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street, for the purpose of ingress or egress thereto. It has the same power, and no more over its streets, that a private individual has over his own land, but it can not be permitted to exercise such dominion to the injury of another's property in a mode, or to such an

extent, as would render a private individual responsible in damages, without being itself responsible. *Nevins v. The City of Peoria*, 41 Ill. 502, and cases cited.

In the case at bar the averments of the pleas are, that the Chicago, Madison and Northern Railroad Company, with lawful power so to do (setting out such corporate power), were constructing a public railroad, the line for which had been previously surveyed and located, under and pursuant to the powers granted it, through the city of Rockford, crossing Main and Winnebago streets in that city; that appellant's lot 3 in block 5, here in question, abutting on Winnebago street on the east, and the lands between Winnebago and Main street for a distance of 48 rods, were owned by the appellant and his wife, and constituted but one property and body of land, over and across which the line of said railway had been prior thereto surveyed and located, which line was indicated by stakes driven in the ground, upon which were marked and indicated the proposed grade of its road when constructed. The line so located by its surveys crossed Main street at grade, and thence westerly across the lands of appellant and those of his wife to Winnebago street, at the point of intersection with which last named street and along the westerly line of appellant's lot 3, extending north, there was then existing and for several years prior thereto had existed, a viaduct in said Winnebago street with a graded southerly approach thereto, erected by the city for the crossing of said streets by other railroads and passing engines and cars thereof thereunder, which was twenty-two feet above the grade of Main street, and it thereby became impracticable to construct and operate its said railroad upon the grade and line of its survey, without cutting off that viaduct and its approaches thereto, rendering it impassable for public travel and use until a new viaduct could be constructed, from such existing viaduct south, with a new approach thereto, to accommodate public travel upon Winnebago street. That the railway company were bound by law to restore such street to its former state of usefulness without unnecessary damage thereto, which required it to construct an extension of the then existing viaduct and suitable and proper approaches thereto,

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and for that purpose made application to the city to designate the methods and plans for the construction thereof, which it was the duty of the city to do and which duty and obligation the city discharged by its public ordinance, passed November 30, 1886, approved December 1, 1886, (and recited in the record before us,) in and by which ordinance, permission and authority were given to said railroad company to construct its railroad crossing over Main street at grade, and to elevate and extend the viaduct on Winnebago street, as the same was thereafter elevated, extended and constructed; that such elevation, extension and construction was a necessary incident to the construction and proper operation of said railway, and the only proper means of restoring Winnebago street to its former usefulness as a street for public travel. That the damages caused thereby to appellant's lot 3, and land, were such that he had a right to withhold his said lot and land from use by said railway company until the same should be paid, and were such that in condemnation proceedings he would have been entitled to have had definite plans and specifications of such viaduct and the approaches thereto abutting appellant's said lot, and all his damages paid; and that after the said survey had been so made and its line of railway established, and the stakes over appellant's land on such line had been driven, showing its line and grade, and after the application by said railway company to said city as aforesaid, and the passage and approval of the ordinance thereof as before stated, and with full knowledge and notice thereof, on the 26th day of December, 1886, the appellant and his said wife, by deed in writing by them duly executed and acknowledged, conveyed to the said railway company the said body of land from Main to Winnebago street for the purpose of construction thereon by the railway company of its depots, buildings and structures necessary and needful in constructing and operating its railroad, including in such conveyance a large part of the said lot 3, for the consideration of \$55,000, then paid appellant therefor by the railway company, by means whereof said pleas averred that the appellant conveyed to the railway company the right to construct and maintain its railroad structures, including the said viaduct

and the extension thereof, pursuant to the ordinance of said city, and then avers that such grant and conveyance to said railway was made by appellant and his wife long after the location of its said line of railway, survey, and establishment of its grade through and across Main street and the lot and lands of appellant and his wife, by its engineers, and the ordinance of said city, raising the said viaduct and extending the southerly approach thereto, and avers the construction of the viaduct by the railway company, its necessity, and that no unnecessary damage was done, etc., and that nothing was done but what was the duty of the city to require in such construction, and that the erection of such viaduct and extension of the approaches thereto, were the only grievances complained of, etc.

That it was the duty of the city, upon the application of the railway company, to grant permission to construct and operate its railroad through that city, and across the streets thereof, and by ordinance or otherwise, supervise, control and direct the construction and maintenance of such crossings so as to secure and protect the rights of the public in the free use and enjoyment of the streets, and the property owners abutting thereon, will scarcely be denied. *Olney v. Wharf*, 115 Ill. 519.

That in the discharge of such duties, regard should be had to the needs and requirements of all its citizens and not to the special interests of any one of them is evident. The right of eminent domain is guarded by constitutional limitations requiring just compensation to be made to the owners of property taken or damaged by its exercise.

This compensation must be ascertained by agreement, when possible; condemnation can be had only in case of disagreement.

It would seem to follow that such agreement, however evidenced, should receive as liberal construction, and be given as broad a scope in application, as its substitute, *i. e.*, condemnation proceedings.

Under the averments of the plea in the case at bar, if true, and we must so regard them in this investigation, it would

be scarcely credible that the appellant made the conveyance of the larger portion of the lot in question, with the other land of his wife, with the grade stakes thereon, indicating the crossing of Main street at grade, at so short a distance from Winnebago street, at the point of intersection with its proposed line of construction, at which point was then existing a viaduct of more than twenty-two feet in height, and after the city had, by its public ordinance, determined the method of such crossing, and authorized the extension of the approaches thereto, extending such approaches to the tenement building of appellant, then erected and in use, without full knowledge, or at least without knowledge of such facts as should have put him on inquiry of the elevation and construction of said viaduct and the consequent extension of the approaches thereto and the damage to his dwellings, if any, occasioned thereby. But, be that as it may, it is distinctly averred in the pleas that appellant was in possession of actual knowledge of all the facts, and with full knowledge thereof made the conveyance to the railway company for the consideration therein mentioned.

It is true that the deed of conveyance made no mention of the purposes for which the land conveyed thereby was to be used, but it was made to the "Chicago, Madison & Northern Railroad," as it is averred, and, by law, railroad companies had power only "to purchase, hold and use real estate * * * for the construction and use of its railroad and stations," etc. (Sec. 20, Chap. 114 R. S.; Sec. 5, Chap. 32 R. S., Starr & Curtis), and appellant was bound to know the law.

Pierce on Railways, at page 133, states the following rule:

"A deed of land to the company for its location, is presumed to include a license to do whatever is lawful in the construction and management of its road, to the same extent and with the same effect as if the land had been *compulsorily taken*, and it is therefore construed to release a claim for injuries (damages) to the lands of the grantors, or for other damages to which the grantor would have been entitled, if the land had been taken by proceedings *in invitum*, to sustain which he cites Norris v. Vt. Cent. R. R., 28 Vt. 99; Rood v. N. Y. & E. R. R., 18 Barb. 80; Conwell v. Spring-

field & Nor. R. R., 81 Ill. 233; Hartsman v. Lex. & Cov. R., 18 B. Monroe, 218, and Booth v. Androscoggin R. R. Co., 51 Maine, 318.

Judge Redfield, in his treatise on the law of railways, Vol. 1, pages 218, 219 and notes, says: "In case of a deed to a railway company of land on which to construct its road, the assent of the company will be presumed, and it will be bound to the conditions of the grant;" and in foot note 6: "And the *rights* and duties of the company in such case are precisely the same as if the land had been condemned by proceedings *in invitum*, under the statute. Such a grant carries with it the incidents necessary to its full enjoyment." Citing in support thereof, Rathbone v. Tioga Navigation Co., 2 Watts & Serg. 74; Norris v. Vt. Cent. R. R. Co., 28 Vt. 99; Hartsman v. Lex. & Cov. Ry., 18 B. Monroe, 218; Louisville & Nash. Ry. v. Thompson, 18 B. Monroe, 733.

In Rorer on Railroads, Vol. 1, 324, it is said, after stating the well known rule of damages in condemnation suits by proceedings *in invitum*, in a foot note to the text, "And this is so, too, when the right of way is acquired by purchase." Citing, in addition to those above cited, Ludlow v. Hudson R. R., 6 Lansing, 128; Hatch v. Vt. Cent. Ry., 25 Vt. 49, and J. N. & S. Ry. v. Cox, 91 Ill. 500.

We think the rule stated in the text books above referred to is fully sustained by the authorities cited by the learned authors above quoted.

To the cases above cited might be added the following cases: N. & W. Ry. Co. v. Swank, 105 Penn. St. 555; Hodge et al. v. Lehigh Valley R. R., the opinion in which last case was filed April 29, 1889, reported in Federal Rep. Vol. 39, pages 449 to 456, and in which cases the questions involved in the case at bar are fully discussed and determined in full accord with the views above expressed.

We regard it as settled beyond question that in proceedings *in invitum* in which damages are assessed, conducted in pursuance of law and without fraud, constitute a bar to an action for all injuries which could legally be included in such assessment. The award in such proceedings is regarded as a

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judicial act, and, unless appealed from, like a judgment at law, becomes *res adjudicata*, and can not be impeached collaterally.

We think the damages claimed in the suit at bar would have been embraced properly, as well as legally, in the damages in condemnation proceedings, under the act of eminent domain.

The right alleged to have been invaded by appellant was one appurtenant to the whole of lot 3, the greater portion of which is averred to have been conveyed to the railway company for the purpose of construction and use of its railroad; and in condemnation proceedings, by the taking for the construction and maintenance of its road over said lot, appellant would have been entitled to all damages sustained, not only by the taking of that part of the lot conveyed, but all the damages caused by the construction, as well as the use, of a railroad to the remaining portion of said lot appurtenant to Winnebago street, whether such damages arose from embankment, or excavation, or in the construction of a viaduct in the approach thereto in Winnebago street, as should be necessary and proper to be made in such construction and maintenance. It is to be observed that appellant, in his declaration, does not aver or complain that the location of the line of railway, its grades or the construction thereof was not in all respects proper and necessary, and the result of good engineering, nor that the viaduct and the southerly approach thereto were not constructed in the most suitable and proper manner, and necessary to be erected and maintained to subserve the use of the street by the public; but the complaint is that a fill of six feet from Main to Winnebago streets created the necessity of raising the viaduct in Winnebago street, and the consequent extension of the approach thereto. It will be further observed that the pleadings disclose that the crossing of Main street at grade was fixed by the city, and it is to be presumed was done in the interest of its citizens and the public in the use of that street, and that good engineering required the fill of six feet for the proper construction of the railway; besides, it is alleged, complainant was fully apprised as to the location

of the line of railway and its proposed grade of construction, and consequent necessity of elevating the viaduct and the approaches thereto, at the time of the execution of such conveyance. Appellant should not be favored in splitting up his damages. In whatever was the manner of that adjustment, it should be regarded as final. The appraisement of damages in proceedings *in invitum* embraces all past, present and future damages which the improvement may thereafter reasonably produce. Mills on Eminent Domain; C. & A. Ry. v. S. & N. W. Ry., 67 Ill. 142; K. & E. Ry. v. Henry, 79 Ill. 290; Sioux City R. R. v. Weimer, 16 Neb. 272; Parker v. Boston & N. E. Ry., 2d Cushing R. 116; Buckner v. C., M. & St. P. Ry., 56 Wis. 403; N. & W. Branch R. R. v. Swank, *supra*; Norris v. Vt. Central R. R., 28 Vt. *supra*; Hodge et al. v. Lehigh Valley R. R., *supra*.

If we adopt the canon of construction claimed by the learned counsel for appellant in the exhaustive argument before us, the same result follows. It seems to us, therefore, that the facts averred in the pleas interposed by the appellee, by necessary legal implication, show full and legal satisfaction for the damages complained of in the declaration, and each and every count thereof, and constitute a legal bar to the action and were properly pleaded, and that the trial court rightfully so held.

Second. Were the replications filed thereto obnoxious to the demurrers?

To the first plea, above, as stated, the appellant filed the replication, "*de injuria*." This replication is not proper in a case where the plea to which it is interposed, sets up some authority in law, which *prima facie* would be a legal defense or justification for the act complained of.

The appellant will not be allowed to enter the plea to show an absence of that authority so as to convert appellee into a *tort feasor*, *ab initio*, 3 Vol. Bouvier's Institution, title, "*De Injuria*;" 1st Smith's Leading Cases, 53 to 61. The plea here shows authority in *law* under the ordinance of the city and also by a deed from appellant to railroad company to make the viaduct, and necessarily the approach thereto. The

demurrer thereto was, therefore, rightfully sustained. This defense as set up in the pleas is in the nature of an estoppel, or authority by the appellant to the railroad company to build the viaduct and approach thereto, in consideration of an amount of money paid by it to him for a deed of certain real estate and right of way, including consequential damages to his remaining property, caused by the injury complained of. The plea is not pleaded as an *excuse*, but in assertion of a claim of legal *right* and is therefore a plea to which the general replication, "*de injuria*" could not be pleaded. Stevens on Pleading, 163, 164, original paging, 8th Am. Ed.; Allen v. Scott, 13 Ill. 80, and cases cited.

The other two replications are improper. They take issue with no proper allegation of the plea. In a legal form, it seemingly is an attempt to set up matter which should have been alleged in the declaration, if requisite or proper to be set up at all; are argumentative, and do not appear to contain any of the legal elements of a replication at law. The plea, as we have attempted to show, in our judgment, set up a perfect defense to the action, as set forth in the declaration, and there being no replication adequate or proper to overcome the defense interposed by the pleas, which stand admitted, the judgment of the trial court in favor of that defense set up by the pleas was therefore proper, and we must so hold.

The judgment of the Circuit Court is affirmed accordingly.

Judgment affirmed.

SMITH, J., dissenting. I do not concur with either the reasoning or the conclusions of the majority of the court in this case. I hold the two last special replications to the defendants pleas were good answers to the pleas to which they were interposed. They properly denied the averments in the pleas or confessed and avoided them and tendered an issue of fact. Even if either of these replications had been open to special demurrers (which I deny) still the special demurrer was not sufficiently specific to reach any special cause of demurrer. It is not sufficient on special demurrer to say that the replication was "argumentative" or "double"

or evasive. The pleader must point out the *precise and particular defect* complained of and, in the language of Chitty, must, "lay his finger on the very spot to which he objects."

A general complaint of want of sufficiency is wholly insufficient in a special demurrer to reach defects of a mere formal character, and which are not reached by a general demurrer. 1 Chitty's Pleading, 668. I think the judgment should be reversed.

ABNER STRAWN

v.

FREDERICK VON GUNDEN.

Master and Servant—Wages—Recovery of—Abandonment of Service—Evidence.

In an action for labor under a contract of hiring which defendant claimed was broken by plaintiff's leaving his employ, it is held that the evidence warranted a verdict for plaintiff.

[Opinion filed May 28, 1890.]

APPEAL from the County Court of La Salle County; the Hon. FRANK P. SNYDER, Judge, presiding.

Mr. SILAS H. STRAWN, for appellant.

Mr. JAMES J. CONWAY, for appellee.

UPTON, P. J. Appellee commenced suit before a justice of the peace to recover from appellant the sum of \$59.35, claimed to be due for work and labor done for appellant before that time. Upon trial before the justice, a judgment was rendered for appellant and the cause taken to the County Court by appeal, in which last named court the cause was tried with a jury, rendering a verdict for the appellee for the amount of his claim, upon which a judgment was entered, and appellant brings the cause to this court on appeal.

Strawn v. Von Gunden.

The suit was for wages due for work and labor of the appellee for the appellant. The defense interposed was that appellee quit appellant's service before the expiration of the term agreed upon without justifiable cause therefor. There is no controversy but that the full amount of the judgment claimed was earned and is now due appellee, unless the defense interposed can be made availing to defeat a recovery.

Appellant testified the contract was that appellee was to labor for him through the month of February, 1888, for the sum of \$20, and the balance of the season, until corn was husked, for \$23 per month. That he quit on the 6th day of November, 1888, and before the corn husking was done.

Appellee testified that he engaged to labor for appellant the season of 1888, until appellant's corn was husked, at the price above stated, provided appellee and the appellant could agree.

This, in substance, was all the evidence as to the contract for service.

It was further insisted and sworn by the appellee that on the 6th of November, in the afternoon of the day he quit appellant's service, that he was directed by the appellant to take a load of hay to town, a distance of six miles from appellant's farm, and make sale thereof. That he accordingly loaded the hay upon the wagon, drove to town, sold and unloaded the hay about four o'clock in the afternoon, collected the money therefor and gave it to appellant at about five o'clock, and put the team in Seely's feed yard and fed them. It being election day, appellee went to the polls at the town hall, and between eight and half-past eight of the same evening, went for the team and found appellant had taken it away, driven it home, and left him to walk a distance of six miles or remain in town for the night. He chose the latter alternative.

On the 8th of November appellee met appellant, when the latter said: "You have served me a pretty trick." Appellee replied, "I don't know which served the best trick, me or you." Afterward, on the same day, appellee testified, the parties again met at the city drug store. Appellee said, "Mr.

Strawn, what does this mean? Am I turned off, or what is it?" Appellant replied, "I don't know which way you take it." Appellee thinks he replied, "I take it as a turn-off."

This conversation, as testified to by the appellee, is denied by the appellant, and what, in fact, were the terms of the original contract under which the labor was performed, and if an entire contract, whether appellee had reasonable cause for quitting that service before the expiration of the term thereby stipulated, were obviously questions of fact, peculiarly within the province of the jury to determine.

Upon these questions we have carefully examined the record in this case, and are not able to say that the jury were not justified, under all the evidence, in finding for the appellee, both as to what the contract in fact was, as well as to the disagreement between the parties, as claimed by appellee, and the rescission of the contract, or that the taking of the team from the servant six miles from his home in the manner and under the circumstances testified to, was not such an indignity toward appellee as would justify him in quitting further performance of the contract. More than this, even, the jury might have reasonably found, from the evidence, that appellant discharged appellee from further service under the contract.

We have also carefully examined the instructions, as modified, given and refused. We think those given to the jury as to the agreement or contract for labor, were correct, and the modifications of the appellant's instructions were quite proper and also legally correct.

Finding no error in this record, the judgment of the County Court is affirmed.

Judgment affirmed.

SAMUEL SHERMAN

v.

THE ESTATE OF WEALTHY SHERMAN.

Administration — Practice — Counter-claim — Limitations — Evidence — Instructions.

Sherman v. Sherman.

1. A counter-claim, which is barred by the statute of limitations, may be pleaded against a claim which was owned by the claimant before the period of limitation expired.

2. In such case evidence of services rendered by the claimant against which the statute has run are admissible to show satisfaction of the counter-claim.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. C. P. BARNES, D. T. SMILEY and JOHN B. LYON for appellant.

Messrs. JOSLYN & CASEY and V. S. LUMLEY, for appellee.

LACEY, J. This was a claim filed in the County Court by appellant against the estate of his mother, Wealthy Sherman, deceased, for \$1,500, for care, services, board and attention rendered her in the last five years of her life, as claimed by him. Upon its being disallowed in the County Court, the appellant appealed the case to the Circuit Court, where it was tried before a jury, and the claim again disallowed, and, upon the appellant's motion for a new trial being overruled and judgment rendered against him for costs, the case is brought here by appeal.

On the part of the appellant, in the court below, there was a great deal of evidence in support of the claim, and unless there were some defenses proven, or the appellant's evidence contradicted and overthrown, the jury would have been warranted in returning a verdict in favor of appellant for at least a considerable portion of his claim.

One of the defenses set up by the appellee was that appellant had, by agreement with the other heirs of the deceased, undertaken to care for her during her life, in consideration that the other heirs would deed to him their reversionary interest in a certain forty-acre tract of land, which had been set off to deceased as dower, in the real estate of her deceased

husband, and it was contended that the deed was made by three of the heirs to appellant and Jerry, his brother, at appellant's request, and Jerry was also to deed to appellant, which he never did. This, however, the appellant disputed, and contested such claim. The appellee also contended that appellant had the use of the dower forty-acre tract, worth \$4 per acre per year, for at least ten years preceding the death of Wealthy Sherman, deceased. This was in the nature of a cross-claim against appellant, in case appellee should fail in the defense that appellant was keeping deceased under the above agreement with the heirs. On this point Homer Wattles was called as a witness by appellee, and allowed to testify, against the objection of the appellant, that appellant had the use of the forty-acre tract of land in question for ten years since the time of the contract in question, and prior to the commencement of this suit, which was worth \$4 per acre per year. The appellant insists that this was error, as to all except for five years immediately preceding the death of Wealthy Sherman, deceased; that the five years statute of limitations would cut it off. This would probably be so, were it not for Sec. 17, Chap. 83, R. S. This section allows a counter-claim to be pleaded, even if barred by the statute, if the claim against which it was pleaded was owned by the claimant before the counter-claim was barred. In this case appellant's claim was owned before the first five years of the proposed set-off was barred, and kept accruing all the time, from year to year, and thereby prevented the statute from running.

The court, therefore, in view of that statute, did not err in allowing the proof. But the court refused to allow appellant to show that during all the time for the five years next preceding the time covered by appellant's claim, he boarded and cared for his mother, and thereby fully satisfied that portion of appellee's counter-claim. This was in the nature of showing payment of such counter-claim, and the appellant was not concluded by his account filed, which did not cover such time.

The court, we think, erred in refusing the evidence intended to impeach the witness Wattles. He had testified to alleged

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admissions of appellant, to the effect that he had agreed to keep deceased for the land, and had denied, on cross-examination, that he had told appellant and his brother Jerry, at the house of appellant, soon after the mother's death, that he did not know anything about this agreement being made. In rebuttal, by way of impeachment, Jerry testified that Wattles did make the statement at the time and place mentioned.

In rebuttal appellant was also called to testify in contradiction, by way of sustaining the impeachment. This the court refused to allow.

The conversation occurred after the death of the mother, and the appellant was a competent witness to impeach the witness Wattles. The Circuit Court erred in excluding it. The only instruction given for the appellee was erroneous. There was no proof that all the heirs deeded the forty-acre tract of land to the appellant. Only three made a deed to appellant and Jerry, and Jerry never deeded to appellant. There was no evidence that appellant agreed to support "Wealthy Sherman" and *said other heirs* "during her natural life," as supposed in the hypothesis of the instruction. For these errors the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

HENRY A. SANGER ET AL.

V.

MARCIA C. PALMER.

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Mortgage—Foreclosure—Res Adjudicata.

Where a claim is disallowed by the court a mortgage which was given as collateral security therefor falls with it.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. GARNSEY & KNOX, for appellants.

Messrs. H. M. SNAPP and R. A. CHILDS, for appellee.

C. B. SMITH, J. This was a suit in equity brought by the appellee in the Circuit Court of Will County, on the 27th of April, 1888, to foreclose a mortgage given to secure a note of \$1,500, dated March 12, 1875, with interest payable monthly at ten per cent, in gold coin, due in five years from the date thereof. This note and mortgage was executed by the late L. P. Sanger, at Oakland, California, while the maker was there temporarily sojourning for his health, confined to his room by a mortal sickness, and attended by appellee.

The note was made payable to her, and the mortgage, which is sought to be foreclosed, conveyed, by a general description, the real estate by the decree of the court below ordered to be sold.

On the 23d day of March, 1875, L. P. Sanger died, testate, at Oakland, California, leaving no widow, and Henry A. Sanger, one of the defendants hereto, and Frances Louise Steele, (nee Sanger,) now deceased, his only children and heirs at law, and sole devisees under his will.

After his death the mortgage above described was placed on record in Will county, wherein the lands described were situate.

The last will and testament of L. P. Sanger was duly proved and probated in the county of his residence, viz., Cook county, Illinois, and letters testamentary duly issued to Henry A. Sanger as sole executor, who qualified, and is now acting as such.

Shortly after the death of L. P. Sanger, his daughter, Mrs. Frances Louise Steele, died, leaving three children, named Sanger Steele, Mrs. Fish and Francis Steele, her only heirs at law, and who are named as appellants herein. Sandiford and Van Vleet are tenants in possession of parts of the mortgaged premises, under the appellants, heirs of L. P. Sanger's estate, and legatees under his will.

On the 18th of June, 1885, the appellee, Marcia C. Palmer, filed in the County Court of Cook County, wherein the estate

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of L. P. Sanger was then being administered, her claim against that estate. That claim, as then made and verified by the oath of the appellee, consisted of nine different items. The last item of her claim, numbered "nine," was the note and mortgage here in controversy.

The item thereof numbered "eight," for the amount of \$5,600, was for money claimed to have been advanced, or delivered to L. P. Sanger, in his lifetime, to loan for the appellee's use and benefit, and which, as she claimed, was loaned by him on real estate situate on west Twelfth street, in Chicago, known as the "Mayo Mortgage," upon which property, appellee claimed, existed a prior incumbrance, which money advanced, with interest thereon, and including interest paid on the prior incumbrance, aggregated the said sum of \$3,600, for which last named claimed indebtedness, the note and mortgage here in suit, being item number "nine" of appellee's claim, was given as collateral security only.

The entire claim, as presented by the appellee against Sanger's estate, aggregated the sum of \$12,745. Attached to the claim was the affidavit of the appellee, which was, in substance, as follows: "Being duly sworn, says that the annexed account against the estate of Lorenzo P. Sanger, deceased, is just and unpaid, and deponent verily believes that all credits and offsets thereto have been allowed, except \$1,500, in the nature of collateral security, which is to be deducted in case of payment of the *eighth item* of the account; all the rest is *bona fide* due on the account or claim, as stated, and she knows of no other claim;" which was signed by the appellee, and verified.

Judge Horton acted as the attorney of appellee in the County Court. He testifies that the claim as filed was vigorously contested in the County Court for several years, and considerable testimony by deposition and otherwise was taken and heard by the court, and upon final hearing on the 13th day of March, 1877, a final judgment was rendered upon the claim so presented to the County Court, allowing the complainant the sum of \$5,891.62. From this judgment no appeal was taken and the same still remains in full force. The

amount of the said claim so found due was paid in full to appellee or her assignees, by Henry A. Sanger, as executor, in due course of administration upon the said estate, the 27th of July, 1879. Judge Horton also testifies in effect that the note and mortgage now in suit was the collateral referred to in the affidavit of appellee attached to the claim filed as hereinbefore set forth, and that the \$3,600 constituting the eighth item of appellee's claim was the principal debt to which the note and mortgage in this suit was collateral. In other words, if the \$3,600 claim had been allowed and paid, no part of the note and mortgage security here in question could have been recovered or suit therefor maintained.

It is conceded that the main contention in the County Court was over the *bona fides* or legality of this \$3,600, the eighth item in appellant's claim, and its allowance against Sanger's estate, and it is also conceded or established beyond cavil, that this item was adjudicated by the County Court and disallowed entirely. It is not apparent in reason or as a legal proposition, how the principal thing and that which is the moving consideration for the giving of the (collateral) security, still remain intact, in full force and effect.

There is no pretense that the eighth item was withdrawn, but it was adjudicated and wholly rejected by the County Court and this was a conclusive adjudication or determination by a court of competent jurisdiction, that the appellee's eighth item (\$3,600) was unjust in every part. If this be so, the note and mortgage taken as collateral to said claim and every part thereof as security therefor, must also fall, as there is no consideration to sustain it.

But it is insisted that the ninth item of appellee's claim, the note and mortgage now in suit, was withdrawn before the County Court adjudicated upon the claim and without prejudice to the appellee.

This, we think, as a matter of law, could not be done; when the principal or primary indebtedness was discharged or released, the incident (security) fell with it. The withdrawal of the collateral note and mortgage was not in law or in fact a withdrawal of any part of the principal set out in the eighth

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item of the claim. The judgment of the County Court in disallowing the claim for the principal, \$3,600, is in full force and estops appellee from asserting any claim to, or remedy upon securities collateral or otherwise held by her for its payment.

In the view we have taken of this case, it is not necessary to examine several other points made in the arguments submitted on the hearing.

The decree of the Circuit Court is therefore reversed, and the cause remanded with directions to dismiss the bill for want of equity.

Reversed and remanded with directions.

THOMAS J. KEIST
V.
KINGMAN & COMPANY.

Sales—Breach of Warranty—Notice—Waiver—Judgment.

1. Where notes with power of attorney to confess judgment, given in payment of a machine warranted to do good work, are put in judgment before breach of the warranty, which afterward occurs, the judgment should be set aside on motion supported by affidavits, and the purchaser be allowed to plead.

2. If the seller responds to verbal notice of breach of warranty, he thereby waives a provision in the warranty that the notice must be in writing, and must be also given his agent.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. THOMAS F. TIPTON and DAN. F. RAUM, for plaintiff in error.

The rule is well settled that when judgment is taken by confession, on motion of the defendant, supported by affidavits

disclosing a meritorious defense, the court should give the defendant an opportunity to defend the same. *Martin v. Stubbings*, 20 Ill. App. 381.

Courts of law exercise equitable jurisdiction over judgments entered by confession upon bonds and warrants of attorney, and where it clearly appears that the plaintiff was not entitled to judgment, the court will vacate the judgment; but if the case is doubtful an issue will be directed, and the defendant will be let in to plead and defend on the merits, and proceedings will be stayed and the judgment allowed to stand as security, and such judgment may be vacated or issue made at a subsequent term. *Lake v. Cook*, 15 Ill. 343; *Burwell v. Orr*, 84 Ill. 465; *Gordon v. Goodell*, 34 Ill. 429; *Norton v. Allen*, 69 Ill. 306; *Wyman v. Yeomans*, 84 Ill. 403; *Condon v. Besse*, 86 Ill. 159; *Walker v. Ensign*, 1 Ill. App. 113; *Henny v. Alcock*, 9 Ill. App. 431; *Campbell v. Goddard*, 17 Ill. App. 382; *Hall v. Jones*, 32 Ill. 38.

The rule may be further stated to be that on filing an affidavit which, if proved, will bar the action, the judgment should be opened up. *Pitts v. Magie*, 24 Ill. 610. That is, when an application is made by a defendant to open up a judgment by confession and the affidavits show that his defense, if substantiated, would be a good one, and that a question is presented which should be submitted to a jury, the court should set the judgment aside and permit the defense to be made, and the facts may be presented by affidavits and exhibits to be filed; and if the affidavits and exhibits filed in support and resistance of the motion are admissible in case of motion to vacate and set aside a judgment by confession as well upon motion to open the judgment to admit a defense on the merits. *Joliet E. L. & P. Co. v. Ingalls*, 23 Ill. App. 48; *Lake v. Cook*, 15 Ill. 353; *Condon v. Besse*, 86 Ill. 159.

The question is not whether the appellant can defeat a recovery entirely or materially lessen the judgment; if so, it would amount to a final trial. But if he shows by affidavits a state of facts that, if true, ought to be submitted to a jury, it is sufficient; nor is it a question whether the judgment should be vacated for error of law, but whether it appears to

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the court in the exercise of its equitable jurisdiction there is any equitable reason shown for opening up the judgment and allowing the party to defend the case on its merits. *Knox v. Winsted Savings Bank*, 57 Ill. 330; *Campbell v. Goddard*, 17 Ill. App. 382; *Rising v. Brainard*, 36 Ill. 80.

Messrs. STEVENS & HORTON, for defendant in error.

LACEY, J. This is a writ of error sued out of this court to reverse a judgment against plaintiff in error on denying a motion to set aside a judgment for the sum of \$708.24 in favor of defendant in error against him, under a power of attorney attached to two notes given by the latter to the former. The notes were given by plaintiff in error, in consideration of the sale to plaintiff in error, by defendant in error, of a certain threshing machine and separator purchased of defendant in error of its agent at Monticello, Piatt County, Illinois, under a certain contract which will be considered hereafter. The grounds urged for setting aside the judgment and allowing the plaintiff to make defense, were that the machine and separator did not fill the warranty, in that the machine, separator and stacker did not do good work, that it was defective and did not save the grain, and that plaintiff in error returned the machine to Kastil, defendant in error's agent at Monticello, and that the consideration of the notes had failed, and the taking judgment on them was an act of bad faith on the part of the defendant in error. The motion was supported by several affidavits showing the contract, failure and return. The order to defendant in error to ship the machine to plaintiff in error, was given to defendant in error on or about the 20th of June, 1888, or as soon thereafter as it could obtain transportation, to the care of Thomas Kastil, Monticello, which order was as follows: one 33-inch cylinder, 46-inch Cyclone separator, with trucks and regular stacker, etc., etc., for which the plaintiff in error agreed to receive the above, subject to the condition named below, etc. * * * Condition of said contract was that it was fully understood and agreed that it was subject to the acceptance of Kingman &

Co., and that no promise, whether of agent, employe or attorney or other manufacturers made unless considered and ratified by him or the branch office. Title to machinery not to pass until settlement is concluded and accepted by Kingman & Co. Changes may be made by consent, etc. The following is the contract of warranty :

"The above articles are warranted to be of good material, well made, and with proper management, capable of doing as good work as similar articles of other manufacturers. If said machinery, or any part thereof, shall fail to fill the warranty, within ten days of first use, written notice shall be given to Kingman & Co., Peoria, Illinois, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity and friendly assistance given to reach the machine and remedy any defects. If the defective machinery can not then be made to fill the warranty it may be returned by the undersigned to the place where received and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machine shall be returned and no further claim be made on Kingman & Co. Continued possession or use of the machine after the expiration of time named above shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Kingman & Co. under warranty. In case any casting fail through defect in its material during the first season, such defective piece shall be replaced without charge, except freight or express charge; but on any claim for replacement of defective castings, the defective pieces shall be presented to Kingman & Co., or to the dealer through whom the machine was ordered, and shall clearly show the defects. * * * The warranty to extend ten days in oats harvest," etc.

We think a fair consideration of the affidavits submitted show that the machine entirely failed to be as good as warranted, and that notice was given to defendant in error of the fact within ten days after the first use of the machine, and also within ten days after its first use in the threshing of oats,

which was the first day of August, 1888, and that time, opportunity and friendly assistance were given the defendant in error to remedy the defects. The defendant in error acted on the notice and sent one Harshberger to make the machine work, but he failed, and, as we think, the evidence at least *prima facie* shows, ordered the machine returned, which was accordingly done and accepted by Kastil, the agent of defendant in error at Monticello. This was on the 27th and 28th days of August, 1888. The affidavits reasonably show that an order by plaintiff in error to defendant in error was sent by letter to send another machine, and also telegram on the 28th August from defendant in error's agent at Monticello to send another machine. This it refused to do and took judgment on the notes on the 3d day of September, 1888. If on the trial by jury these facts should appear, defendant in error ought not to recover on the notes. This judgment has been rendered on a power of attorney contained in the notes given at a time when it was supposed no trouble would ever arise, and the plaintiff in error's defense, if he has any, has since arisen.

He has had no opportunity to make a defense and to have the question of failure of warranty and return of the machine tested by trial by a jury.

If the court can see reasonable grounds for submission of the issue to a jury the judgment should so far be opened as to allow the plaintiff in error to plead and have the question tried; we think such a probable showing has been made and that the court erred in overruling the plaintiff in error's motion. The contract provided that in the event the machine should fail to fill the warranty and should be returned, the defendant in error should send another machine or return the notes. Neither was done by Kingman & Co., and hence, if plaintiff in error is right in his contention there can be no recovery on the notes. The defendant in error contends that there is no proof that the machine did not do as good work as other machines similar to those of other manufacturers.

We think there is such proof. The evidence tends strongly to show that the machine would not work, in threshing oats especially, so as to be good for anything; that it wasted the

oats, so that it was of no account; that it was not even good for threshing wheat. It would, even without other proof, be unreasonable to believe that there were no good machines. But Combs testified that "when the machine would clean, the grain would not be threshed; it failed to work as good as a machine ought to and would work." Nicholas Lux swears: "Keist did two jobs of work for me with different threshers; one was done with the machine got of Kastil and the other with a new and different machine; I told Preston that Keist had the boss machine now; that he threshed my oats in good shape * * * I was not talking about the machine that had been taken back." This abundantly shows that other machines would do good work. The first threshing of oats was July 31, 1888. Plaintiff in error testifies that on that evening he notified Kastil and wanted an expert. Kastil promised to write to Kingman & Co. On the 1st of August, Harshberger came to see the machine. He did nothing to the machine except put a wheel on the stretcher. On the 9th of August, plaintiff in error sent word to Kastil that he wanted help and he got word back that he would have to wait till the expert came. Finally, on August 25th, plaintiff in error wired the company the machine would not work; "send expert at once, or will return the machine to your agent." In response to this the agent, Harshberger, again came, and it was at this time that the machine was ordered returned and was returned.

The defendant in error, by responding to the notice, though verbal, waived the provision of the contract that the notice should be in writing, also the requirement that defendant in error as well as the agent, Kastil, should be notified. The notice was given within ten days after plaintiff in error commenced threshing oats, and responded to within that time. The provision of the contract that "continued possession or use of the machine after the expiration of the time named above shall be conclusive evidence that the warranty is fulfilled" does not mean that the machine shall be returned within ten days after its first use but only notice shall be given within ten days after

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the first use, etc. For the contract further says that "time and opportunity and friendly assistance shall be given to reach the machine and remedy any defects." The "time and opportunity" etc., would often consume more than ten days. We think the evidence tends strongly to show that defendant in error did not intend to try to entrap the plaintiff in error into keeping a worthless machine by insisting on the manner and time of the notice, but still continued to endeavor to remedy defects to the time the machine was returned and afterward. Believing that the affidavits show sufficient grounds to require the plaintiff to be let in and plead to the merits and have the issue tried by a jury, we think the court erred in not allowing plaintiff in error's motion.

The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

HENRY B. LOWDEN

v.

IDA E. MORRISON.

Contract of Marriage—Breach—Evidence—Instructions.

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1. In an action for breach of contract of marriage, this court holds that a verdict for plaintiff was proper.

2. Evidence of seduction in such action is admissible, though the seduction is not charged in the declaration.

3. In such action an instruction that the unsupported testimony of plaintiff, with a positive contradiction from defendant, will not sustain a contract of marriage, usurps the functions of the jury, and is properly refused.

4. An instruction that the jury are to consider all the evidence before them is unnecessary, and its refusal is not error.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Marshall County; the Hon. T. M. SHAW, Judge, presiding.

Mr. FRED. S. POTTER, for plaintiff in error.

Messrs. BARNES & BARNES, for defendant in error.

C. B. SMITH, J. This was an action brought by Ida E. Morrison against Henry B. Lowden to recover damages for an alleged breach of a marriage contract. The declaration contained two counts. The first count declared upon a contract and promise on the part of appellant to marry appellee upon request, and that upon such request he failed and refused to do so, and the second count upon a promise to marry appellee within a reasonable time, and a breach also of that promise. The defendant pleaded the general issue. On a trial before a jury the plaintiff obtained a verdict for \$2,500, upon which the court, after overruling a motion for a new trial, gave judgment, to which the defendant excepted, and he now sues out this writ of error, brings the record before us, and assigns the usual errors and asks for a reversal of the judgment.

The errors, however, relied upon, and pressed upon our attention are—

First, that the verdict is contrary to the evidence.

Second, that the court erred in allowing proof of seduction to go to the jury.

Third, that the court erred in instructing the jury.

The proof in the case is brief. Ida E. Morrison, appellee, testified that she was a single woman and had never been married, and that she was twenty years old, and that she became acquainted with appellant at his mother's house in July, 1887, where she was then engaged at work, and where she continued to work until the 14th of October following. There were but three persons in the family, appellant, his mother and appellee. When appellee had been there at work about three weeks, she says appellant commenced being familiar with her, and pinched her cheeks, and talked love to her, and told her love stories, and told her that she was pretty and that he loved her, and asked her in return if she loved him, to which she replied she did. This courtship was conducted largely by appellant of evenings, when his mother was

at prayer meeting and absent from home, and while he was at home alone with appellee. In due course of time appellant proposed marriage to appellee, and she swears she accepted his offer and agreed to marry him, and that it was agreed that they should be married some time that fall ensuing, or during the absence of the mother in California, a trip which she then contemplated making that fall. Appellee swears the contract or agreement of marriage was made between them in the second week of August, 1887. She testifies that afterward, on the night of the 28th of August, appellant came to her room and solicited her to submit to his embraces, and said to her that they were already engaged to be married and that it would not make any difference if he did seduce her before they were married. Appellee testifies that, relying upon his promises to marry her, she then submitted her person to him, and that but for such promise she would not have done so. Frequent acts of sexual intercourse followed at appellant's house, under the guise and pretense that it would be followed by marriage in the fall. From these acts of sexual intercourse appellee became pregnant, and on the 21st of June, 1888, was delivered of a child which she testified was begotten by appellant. He was afterward prosecuted in bastardy proceedings for the support of this child.

Appellee testifies that she frequently requested appellant to marry her, and informed him of her condition and reminded him of his promises and of his deceitful conduct and treatment of her, but that he refused to marry her or in any wise assist her in her trouble and misfortune.

E. J. Riely, an attorney and master in chancery of the Circuit Court, testified to a conversation between appellant and appellee in the justice's office when appellant was arrested and brought in on the bastardy warrant.

When appellant was brought before the justice, and in the presence of the justice, witness Riely and appellee, he, appellant, asked, "What was going to be done," and appellee replied "that she wanted him to marry her; but he said, "No, I wouldn't do that," and she replied, "I would like to know the reason why you promised to, and I would like to know why

you won't do it; you promised to, didn't you?" to which he replied, "Yes, I promised to, but I won't."

This was the substance of the testimony for the plaintiff.

The defendant testified on his own behalf and denied that he ever had any courtship with appellee and denied that he ever made any promise of marriage to her, at any time or place, and denied making the admission in the justice's office which was sworn to by Riely, that he did promise to marry her. When he was asked if he had ever had any intimacy with her of any sort he replied, "Not that I remember of, no sir;" and when again asked if he would deny that he had ever had sexual intercourse with appellee he again answered, "Not that I remember of." Taking into consideration the subject of inquiry and the nature and indefinite character of appellant's last two answers it is not strange that the jury should not have placed much reliance upon a witness whose memory played him such fantastic tricks. There were two or three lady witnesses who testified to certain conversations with appellee wherein she said she was going to make a match on appellant, that he was worth \$20,000, and another witness swears that appellee told her the first time she ever met her that the only way she could get appellant to marry her was to allow him to seduce her first; that she wanted him to marry her, and did not know any other way to get him. The cross-examination shows that the testimony of these last named witnesses was entitled to very little credit.

We think upon the whole evidence the jury were well justified in finding the issue for the plaintiff both upon the question of the alleged promise to marry as well as upon the charge of seduction resulting from and as a consequence of such promises. The jury saw and heard all the witnesses and had ample opportunity to know who was testifying truthfully and who falsely, and we can not say that they erred in the estimate they placed upon the capacity and willingness of the various witnesses for telling the truth.

It is again urged that the court erred in permitting proof of seduction without an allegation of the fact in the declaration. In this there was no error. The seduction was not relied

Lowden v. Morrison.

on as a cause of action, but simply as evidence of the wrongful act of defendant resulting from the promise and the breach. It is not necessary to plead that which is merely evidence. *Tubbs v. Van Kleeck*, 12 Ill. 446; *Barnet v. Simpkins*, 24 Ill. 265; *Fidler v. McKinley*, 21 Ill. 308.

It is also objected that the court erred in giving instructions for appellee, and in refusing to give the second, third and fourth refused instructions for appellant. We have carefully examined all these instructions given, and are satisfied they correctly declared the law to the jury, and that there was no error in giving them, nor was there any error in refusing appellant's fourth instruction. It amounted to nothing more than telling the jury to consider all the evidence before them. The jury certainly understood that to be their duty without being so informed by the court. The instruction contained no proposition of law upon which the jury needed instruction. The second refused instruction was not different in substance from the fourth. The third refused instruction is an attempt to get the court to usurp the functions of the jury and to declare, as a matter of law, that the unsupported testimony of the plaintiff, taken by itself, will not sustain a contract of marriage, with a positive contradiction from the defendant, if the witnesses are equally credible. That was a question for the jury and not for the court. The instruction was improper for the further reason that appellee was supported, and her testimony did not stand alone. Some other objections are urged against the ruling of the court in the admissibility and rejection of evidence. It would serve no useful purpose to discuss each of the questions in detail.

We have carefully examined all these objections and are satisfied the court ruled correctly during the progress of the trial, and we have been unable to find any substantial error among the numerous assignments on this record, and the judgment will be affirmed.

Judgment affirmed.

FELIX W. CALKINS

V.

JOSIAH WILLIAMS, ADMINISTRATOR.

Real Property—Vendor and Vendee—Contract for Deed—Breach—Estoppel.

A vendee, in an action for the purchase money, can not set up breach by the vendor of a contract to furnish him a deed from another person having an interest in the land, if by procuring the deed himself he has made it impossible for the vendor to do so.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EVANS, for appellant.

Mr. ROBERT DOYLE, for appellee.

UPTON, P. J. On the 23d of March, 1885, a contract was made by which Mary Troup sold and was to convey to the appellant forty acres of land, for the price of \$550, of which \$100 was to be paid in cash, and the balance on July 20, 1887, with interest at eight per cent per annum, and upon payments being made, a deed was to be given.

On the 16th of February, 1886, this contract was modified or superseded by another between the above named parties, by which appellant was to, and did pay the further sum of \$225, and agreed to pay \$225 more, being the balance of the original purchase price, on the 20th of July, 1887, without interest, provided a judgment in favor of Josiah Matzenbaugh against Charles Troup and Mary Troup, should be satisfied, and a deed of the forty acres of land procured from one W. H. Somers, who had a small interest in the land or was supposed to have, to appellant. The \$225 was not to be paid by

appellant until that judgment should be satisfied, and a deed from Somers procured.

The appellant went into actual possession of the land in controversy, on or about the 23d of March, 1885, and has since that time, and now is, in possession thereof, and residing thereon with his wife, Rosaline Calkins, and his family, receiving the rents, issues and profits thereof.

It was stipulated as an admitted fact on the trial of this case in the court below, that the judgment referred to in the contract of Matzenbaugh against Mary and Charles Troup had been vacated before the commencement of this suit; indeed, the evidence tended to show that the judgment never was a lien upon the forty acres sold at all.

Soon after the making of the modified contract above referred to, and on or about the 17th day of September, 1886, and nearly a year before Mary Troup had contracted to obtain a conveyance from W. H. Somers of the forty acres, Rosaline Calkins, then the wife of and living with appellant, obtained from W. H. Somers and his wife, for the expressed and actual consideration of \$15, a deed of conveyance to herself of this forty acres, which was placed of record, of which neither Mary or Charles Troup were apprised at the time, and to which they in no way or manner consented.

Mary Troup was quite an old lady, and her mental faculties were somewhat impaired, and in her endeavor to procure the deed of the land in controversy from Somers (who resided in the far West), was aided by her son, and by correspondence with Somers learned of the deed from him to the wife of the appellant; and Somers consequently declined to execute another deed. He was finally prevailed upon to execute to Mary Troup a quit claim deed of the land in the latter part of the year 1887, or the first of the year 1888, in which his wife joined. Upon receipt of this deed, which was duly executed, Mary Troup executed, in due form, a conveyance of this forty acres of land from herself to appellant, and the deed from herself and the quit claim from Somers and wife to her as before stated, was tendered to appellant, and the balance due on the contract of purchase demanded of him. Appel-

lant refused payment on the alleged ground that Mary Troup had not obtained the title from Somers as provided in the contract, and being told that his wife had obtained a conveyance—of which it seems evident he must have been apprised, even if not in actual collusion with his wife in obtaining it—wholly refused to pay the balance, or any part of the agreed purchase money.

Thereupon this suit was commenced in February, 1888, in the name of Mary Troup against appellant. Soon thereafter Mary Troup was declared feeble-minded, from old age, it may reasonably be inferred, and one Asa B. Roff was appointed conservator of her estate, and from thence proceedings by leave have been conducted in his name. Some questions were presented to the court below upon the pleadings in the case and are reviewed here, but we think the merits of this case are too apparent to admit of, or require the examination of matters purely technical in character, or which would seem to obscure, rather than enlighten us as to our duty herein.

We are abundantly satisfied from the facts and circumstances in this record that the only pretense to which appellant could resort to avoid the payment of the purchase money for the purchased premises, at the time of the tender of the deeds and demand of payment as above stated, was that the contract had not been performed in that Mary Troup had not procured a deed of the premises sold him, when in truth and in fact, as we think, a deed of the land was before that time obtained by the wife of appellant and in collusion with him to prevent Mrs. Troup from complying specifically with terms of the contract of purchase on her part, of which slight evidence would be sufficient under the facts and circumstances in this record. We can not but think that the defense interposed in this case is but technical in character and wholly without merit.

In our judgment substantial justice was done on the hearing in the trial court, and finding no reversible error in the record, that judgment is affirmed.

Judgment affirmed.

JOHN A. DICKISON ET AL.

V.

DANIEL S. DICKISON ET AL.

36 503
138: 541.

Wills—Construction.

1. Children to whom a testator in one clause of his will bequeaths property, "to be in full of their portion of my estate, both real and personal," take nothing under the residuary clause, directing the residue of his estate to be equally divided between "my children."

2. Where a testator in specific bequests to his illegitimate children speaks of them each as "my son," or "my daughter," and also speaks of their mother as "my wife," they will share with the legitimate children in the residuary clause, which directs the residue of his estate to be equally divided between "my children."

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. McCULLOCH & McCULLOCH, for appellant, John A. Dickison.

Mr. GEO. B. FOSTER, for appellees.

Mr. ARTHUR KEITHLEY, for Wm. B. Dickison, executor.

UPTON, P. J. On the 9th of April, 1874, the testator, Griffith Dickison, then a resident of Peoria County, made his last will and testament in substance as follows:

First clause providing for payment of debts.

Second. To my son, William B. Dickison, I will certain real estate in fee, describing by government subdivisions.

Third. To my son, Griffith A. Dickison, certain other real estate in fee (describing it).

Fourth. To my wife, Sarah A. Dickison, I will, devise and bequeath the west half of the northeast quarter, etc., during her natural life. At her death to descend to and become the property of my two children, Mary and Estella Dickison, in fee.

Fifth. To my daughter, Fanny Dickison, certain other realty in fee (particularly describing it).

Sixth. To my son, Daniel S. Dickison, certain other real estate in fee (describing it).

Seventh. To my son, Joseph R. Dickison, certain other realty in fee (describing it).

Eighth. To my daughter, Roxie J. Hitchcock, certain other realty in fee (describing it).

Ninth. To my children, John Abraham and Mary Ann, I will, devise and bequeath the west half of the northwest quarter of section twenty-seven in township ten north, range seven east, in equal shares, to be in full of their portions of my estate, both real and personal, to be theirs, their heirs and assigns forever.

Tenth. To my son, Griffith A. (a specific devise).

Eleventh. All the rest of the real estate of which I may die possessed, shall be by my executor sold, also all the personal property I may have at my death shall be sold, and from the proceeds of such sales he shall first pay all my just debts, etc.; the remainder he shall divide amongst my heirs as follows: To my wife, Sarah A. Dickison, one-third part thereof, and the remainder to my children in equal portions, share and share alike, to be theirs, their heirs and assigns forever, absolute.

Twelfth. I appoint my son, Wm. B. Dickison, executor.

Dated April 9, 1874. (Signed and witnessed.)

To which was attached by the testator on the 7th day of March, 1882, the following codicil executed in due form of law, in substance, as follows:

Whereas, I, Griffith Dickison, did, on the 9th day of April, 1874, make my last will and testament, in and by which will I made devises to all my children then born, and whereas, since that date a son has been born to me whom I have named

Dickison v. Dickison.

Fred, I make this a codicil to my said will to have the same force and effect as if it was a part of my original will. That is to say, I will, devise and bequeath to my son, Fred, certain realty in fee, and to my daughter, Roxie Jane Hitchcock, certain realty in fee, describing it.

Dated March 7, 1882. (Signed and witnessed.)

The testator died in Peoria county on or about March 14, 1886, and shortly after his death, his will, with annexed codicil, was duly admitted to probate in Peoria County Court in due form of law, and William B. Dickison, named therein as executor, was duly qualified and acted as such, to whose appointment or acts therein no question is here made.

On the 5th of January, 1889, the executor, Wm. B. Dickison, filed in the County Court of Peoria County his final report as such executor, showing in his hands after payment of all claims against the estate and costs of administration, the sum of \$9,214.05, for distribution in accordance with the provisions of the above recited will of Griffith Dickison, deceased.

It seems uncontroverted as the fact in this case, that Griffith Dickison, the testator, in his lifetime had by his first wife three children, and by his second wife two children, making five legitimate children. The testator was divorced from his second wife, but before the divorce was obtained the two persons named in his will as "my son Daniel S. Dickison, and my daughter Fanny Dickison," were born to him by another woman whom he designated in his will as "my wife, Sarah A. Dickison," and by whom he also afterward had born to him four other children, making six of this latter branch, which are called in the argument before us, illegitimate, the testator never having been formally married to the said "Sarah A.," their mother, or if married, such marriage is not shown by the evidence.

After the death of the testator, and some time prior to the filing of the report of the executor in this proceeding, "Sarah A. Dickison" died, thus leaving the eleven children of the three branches above named, her surviving.

On the hearing as to the distribution of the reported assets in the County Court, it was insisted and contended that under

the ninth paragraph of the will John A. and Mary Ann Dickison had received in real estate their and each of their full shares and portions of said estate, and should not be entitled to receive anything under the residuary clause of the will. This objection was sustained by the County Court and they were denied the right to share as distributees in said sum of \$9,214.05. It was also further objected and contended in the County Court that Fanny M., Daniel S., Joseph R., Estella G., Mary and Fred Dickison should be excluded from, and not be permitted to share in the distribution of said sum under the residuary clause of said will, for the reason assigned, that they were the children of said testator and the said Sarah A. Dickison named by the testator in his will as his wife; that the testator and Sarah A. Dickison were never married and that the said children were therefore incapable of taking under the eleventh or residuary clause of the will. The court overruled the last objection and ordered and directed the executor to make distribution of said sum in equal parts between the children of all branches, those called legitimate as well as those designated as illegitimate, being nine in number, as distributees, excepting John A. and Mary Ann Dickison, who were excluded as before stated, as having received their full share and portion of the estate under the ninth clause of the will; exceptions were taken to the decision, order and direction of the County Court, and appeal prayed to the Circuit Court by William B. and John A. Dickison, and the appeal was heard in the Circuit Court, and the judgment, order and decree of the County Court therein was fully and in all things affirmed, and appellants, excepting to the judgment of the Circuit Court, the case was further appealed to this court, and upon the record presenting the before mentioned facts, two questions arise for our determination.

First. Is appellant, John A. Dickison, entitled to share in the sum to be distributed under the eleventh or residuary clause of the will, notwithstanding the provisions of the ninth clause thereof?

Second. Are the appellees, the six so-called natural children of testator, viz., Fanny M., Daniel S., Joseph R., Estella

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G., Mary and Fred Dickison, entitled to share as distributees under said residuary clause in the testator's will?

The rules of law governing the construction of wills are so plain and well known as to require no extended citation of authorities upon that subject.

The object in construing a will is, first, to ascertain and give effect to the intention of the testator, that it may be enforced in the sense in which he understood it. The intention of the testator expressed, taken as a whole, must govern in its construction. Hence, the question of first importance in every case of the construction of a will is, what was the intention of the testator? and when that is ascertained, effect is to be given thereto accordingly; and it is the duty of the court, in the absence of latent ambiguity, to gather that intention from the will alone, giving effect to all words, without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator. *Blanchard v. Chapman*, 22 Ill. App. 341; *Taubenhau v. Dunz*, 125 Ill. R. 529, and authorities there cited; *Caruthers v. McNeill*, 97 Ill. 256; *Kennedy v. Kennedy et al.*, 105 Ill. 350.

In the last above cited case it was held, not only that the principal inquiry in the construction of a will was the intention of the testator to be gathered from the will itself, but, when that intention satisfactorily appears, it must prevail over any artificial rules of construction.

Applying these principles, which are undisputed, to the questions presented by the record before us, we think them not difficult of solution.

First. As to the right of John A. and Mary Ann Dickison to participate in the distribution of the \$9,214.05 under and by virtue of the residuary clause of the will. The 9th clause of the will in controversy is as follows:

"To my children, John Abraham and Mary Ann, I will, devise and bequeath the west half of the northwest quarter of section 27, township 10 north, range 7 east, in equal shares, *to be in full of their portions of my estate, both real and personal*, to be theirs, their heirs and assigns, forever."

It would be difficult, we think, to misapprehend the intent of the testator from the language used in this clause. To hold that they, or either of them, were entitled to participate in the distribution of his estate, real or personal, under the residuary clause in that will, would of necessity be to nullify and render wholly inoperative the plain intent and meaning of the 9th clause thereof, as it seems to us.

In our judgment, the Circuit Court did not err in so holding.

Second. Are the appellees, the six so-called natural children of the testator, who are claimed as illegitimate, entitled to share as distributees under the residuary clause of the will.

There can be no question but that each and all of the children of the testator, legitimate or otherwise—named as such in the will, are entitled to take under the residuary clause thereof, if it was the intention of their father that they should so take, and in determining that question it is always proper to examine each provision of the will that has any bearing on the point in dispute, and construe them together.

In the view we have taken of the case at bar, we are not called upon to determine what would have been the rights of the children of the testator denominated "illegitimate" under the term "my children" in this residuary clause, if it were standing alone, unaided by other parts of the will, or whether the term "my children" should be held to mean legitimate children only, or primarily as claimed by the appellant.

We think it manifest from the other portions of the will in the case at bar, who the testator intended by the general term "my children" in the residuary clause thereof. In the second clause we find this language; "To my son, William B. Dickison," in the third clause, "To my son, Griffith A. Dickison," in the fourth clause, "To my wife, Sarah A. Dickison * * * during her natural life, at her death to descend to and become the property of my two children, Mary and Estella G. Dickison." The fifth clause devises "To my daughter, Fanny May Dickison," the sixth clause devises "To my son Daniel S. Dickison," the seventh clause devises "To my son, Joseph R. Dickison," the eighth clause devises "To my daughter, Roxie

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J. Hitchcock," the ninth clause devises "To my children, John Abraham and Mary Ann Dickison," the tenth, a second devise "To my son Griffith A.," the eleventh, the residuary clause, devises "To my wife, Sarah A. Dickison, one-third part," etc., "and the remainder to my children in equal portions share and share alike," etc., and by the codicil, "To my son Fred," etc. Each and every one of the eleven children are especially named, and each and every one are called by the testator "my son," "my daughter," or "my children," and the mother of these so-called illegitimate children is twice named in the will as "my wife, Sarah A. Dickison."

Thus manifestly the intention of the testator was, as we think, to include by the words "my children" as used in the residuary clause, those called legitimate, as well as those denominated illegitimate, by appellant's counsel, except John A. and Mary Ann Dickison, to whom the testator had by the ninth clause of the will given their full share in his estate, as we have before stated.

To hold otherwise would, it seems to us, be doing violence to the language used, and the manifest intention of the testator as well, and we think could only be arrived at by adopting an unnatural and artificial rule of construction.

We think the views herein above expressed are in full accord with the rulings of the court of last resort in this State, and are fully supported by the late case of *Elliott v. Elliott*, determined by the Supreme Court of Indiana, in an opinion filed February 19, 1889, reported in 20 N. E. Rep. 264.

Finding no error in the order or proceeding of the Circuit Court, that order and judgment is affirmed.

Order and judgment affirmed.

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BERTHA BRUCK AND AUGUSTUS BRUCK

v.

C. S. BOWERMASTER.

Mechanic's Lien—Husband and wife—Agency—Estoppel—Evidence.

1. If, after a contract for labor on a building belonging to the wife is made by her husband with one who is ignorant of the wife's interest, the wife, knowing what is being done, does not disclose her interest or prevent the work, she will be estopped to set up her rights as a defense to a mechanic's lien.

2. In this suit to foreclose a mechanic's lien, it is held that the husband contracted for the work as his wife's agent.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of La Salle County; the
Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. JAMES J. CONWAY, for appellants.

Mr. M. W. ARMSTRONG, for appellee.

LACEY, J. This was a proceeding commenced by appellee to foreclose a mechanic's lien on a certain house and lot in Ottawa, Illinois, for a bill of painting of \$75.80, which he contracted, as he claims, for labor and material on the house and lots and fence around there for that sum of the appellant Augustus Bruck, as the agent of Bertha Bruck, who was his wife. The court below found the issues on a trial on petition, answer and the evidence in favor of appellee, and rendered decree for the sale of the premises to pay such bill, which it held to be a lien on the house and lots. The appellant Bertha, who was the owner of the lot, and in whose name the title stood through deeds from her husband to a third party, and from that party to her, some time before the contract for painting was made, contended in her answer and on trial, and contends here, that her house and lots are not liable for the alleged mechanic's lien, for the reason that the contract was made with

Bruck v. Bowermaster.

Augustus, her husband, and that she neither made the contract, expressly or impliedly, for the painting, and that the mere fact that the work was done on her premises would not make her lots liable to be sold to pay for the painting and materials put upon the house. The appellee contended to the contrary, and succeeded in the court below. There is some conflict in the evidence as to matters of fact, though we think the evidence fairly supports the contention of the appellee. It appears that at the time the contract was made the appellee was ignorant of the fact that the title to the premises stood in the appellant Bertha, though it was of record; also that the appellant Augustus was insolvent; and made the contract with him supposing that he owned the lots and was solvent, and knew no better till he had sued him for the bill before a justice of the peace, when it developed on the trial that the title of the lots stood in Mrs. Bruck, and that the husband was insolvent. The contract was made in the early part of April, in 1888, and, as appellee swears, at request of Bruck he went to the house and Mrs. Bruck and her daughter Tillie were there and showed him the parlor and sitting room, and talked over the paints, and told appellee and his brother, and decided what kind of graining and painting she would have, after which appellee and the husband made the contract for the painting, at \$65, to which afterward was added the fence, at \$10, and afterward Mrs. Bruck sent for and procured one-half gallon of flour paint, of a red color, for which is charged eighty cents. It appears from the evidence of one of the witnesses, one of the painters, that Mrs. Bruck was there every day while he was painting, and when he mixed the last coat he called Mrs. and Miss Bruck out, and they said the colors were what they wanted, to go ahead with the job.

It is evident that the entire work was being done on the property of Mrs. Bruck and that she derived the entire benefit; she knew her husband was insolvent and unable to pay for the work, and yet she did not disclose the fact that the title to the lots stood in her name, and stood by and saw the work done and directed its operation. It is in evidence that the contract, while really made with Bruck, was for Mrs. Bruck.

The husband had the direction of Mrs. Bruck's affairs, and as the head of the family acted for her in most things. Mrs. Bruck must have known that appellee was making the improvements with the knowledge that the statute gave him a mechanic's lien, also that her husband was insolvent, and yet saw the work go on and accepted the benefits without making any disclosure as to the true condition of things. This we think would be bad faith, and would be good grounds for estoppel against her. In *Schwartz v. Saunders*, 46 Ill. 18, the Supreme Court lays down the rule as follows: "If a contract for the erection of a building is made by the husband and the same is erected on real estate belonging to his wife, in her separate right, with her full knowledge, approbation and consent, and she does not disclose her interest, and knowing what is being done, takes no steps to prevent it, she will be estopped from setting up her rights as a defense to a mechanic's lien." See, also, authorities to similar effect: *Higgins v. Ferguson*, 17 Ill. 268; *Donaldson v. Holmes*, 23 Ill. 83; *Bergen v. Keiser*, 17 Ill. App. 505; *Anderson v. Armstead*, 69 Ill. 452; *Burns v. Lane*, 23 Ill. App. 504; *Paulson v. Manske et al.*, 126 Ill. 72.

We think, also, that the court, under the circumstances, would be justified in finding that the appellant Augustus was acting as the agent of his wife, though it was not at the time known to appellee he was in the habit of so acting, and she received the benefits of the contract and directed the entire work as though she owned the house. Since the lots were in her name, what would be more natural than for the parties, being husband and wife, to act in such manner. Story on Agency, Sec. 446.

We do not think that appellants have sustained the allegation that the work was to be paid for in trade.

Seeing no error in the record the decree of the court below is affirmed.

Decree affirmed.

A. SCHILLING ET AL.
v.
CHAS. E. DEANE ET AL.

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Attachment—Debt not Due—Intervention of Judgment Creditor.

1. A creditor can not bring attachment if no part of his claim is due.
2. A judgment creditor can interplead in an attachment suit and set aside a judgment entered therein on a debt not due.
3. A debt not due when an attachment suit is commenced thereon will be postponed to a junior attachment creditor whose debt is due.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for plaintiffs in error.

Mr. GEORGE W. THOMPSON, for defendants in error.

An intervenor in this State can defend against the attachment and show there was no ground for it when the defendant fails to defend. Statute of Ill., Attachment Act, Sec. 29; *Farwell v. Jenkins*, 18 Ill. App. 491; *Heyer et al. v. Alexander et al.*, 108 Ill. 385; *People, for use, v. Stitt et al.*, 7 Ill. App. 294; *Smith v. Gettinger*, 3 Georgia, 140; *Ruppert v. Haug*, 87 N. Y. 141; *Buckman v. Buckman*, 4 N. H. 319.

The same is held to be the law in California, Mississippi, South Carolina, Virginia and other States. See a full discussion of this subject in *Drake on Attachment*, Secs. 273–5 inclusive.

The attaching creditor must swear the claim is due prior to the issuing of the writs, and the fact that a claim is not due is a perfect and full defense against an attachment, and this question is properly raised by a subsequent attacher or judgment creditor by a plea of intervention. Sec. 4, Attachment, Stat-

ute of Ill.; Buckman v. Buckman, 4 New Hampshire, 319; Webster v. Harper, 7 New Hampshire, 594; Walker v. Roberts, 4 Richardson (S. C.), 561; Davis v. Eppinger, 18 California, 378; Spyer v. Ihmels, 21 California, 281; Henderson v. Thornton, 37 Miss. 448; Ayers v. Husted, 15 Conn. 504; Smith v. Gettinger, 3 Georgia, 140; McCluney v. Jackson, 6 Grattan (Va.), 96; Drake on Attachment, Secs. 274-280.

In some States, by reason of special statutes, the specific right to an attachment before the debt is due is given, yet even in those, judgment can not be rendered until the maturity of the debt. Code of Iowa, (1882) Sec. 2956.

This statutory provision of some States is mentioned, as it will explain the decisions that may be cited *contra*, showing some States to permit attachments before maturity.

The statute of Illinois does not permit an attachment upon a claim not due. Statute of Ill., Attachment Act.

LACEY, J. Plaintiffs in error, A. Schilling & Co., on November 13, 1886, were the creditor of J. C. Ayling in the amount of \$185.10, and received draft on four months time.

On the eleventh of January, 1887, they became the further creditor in the amount of \$235, and accepted a draft due in four months for that amount, both bills being for tea sold.

On January 27, 1887, the plaintiffs in error swore out an attachment for \$420.10 against Ayling, claiming that amount to be due by the affidavit, the grounds of the attachment being that Ayling was about to remove his property from the State, and had within two years fraudulently conveyed it.

An ordinary declaration in *assumpsit* for goods sold and delivered was filed with a copy of account sued on and with no affidavit of merits, the account showing that it was for the above items of tea sold.

On January 20, 1887, defendants in error obtained a judgment in the Superior Court of Cook County, Illinois, against the same Ayling for \$707.23, and execution issued thereon directed to the sheriff of Knox County, Illinois, who levied it on the same goods the attachment was levied on the preceding day. The appearance of an attorney was entered in the

Schilling v. Deane.

Knox Circuit Court for Ayling, and on March 10, 1887, defendants in error interposed in the suit between plaintiffs in error and Ayling, setting up the facts of their judgment, execution and levy on Ayling's goods that had been attached in favor of plaintiffs in error; that said Ayling had no other property liable to execution or attachment, and the interpleader's rights are prejudiced by said attachment, the interpleaders also stating that the action of plaintiffs in error was misconceived and prematurely brought, and that they should be non-suited; that the debt on said attachment was not yet due, and that no attachment would lie on the same against the property of J. C. Ayling, and that the same was wrongfully issued, which interpleader was sworn to. On March 24th Ayling's appearance in plaintiffs in error's attachment suit against him was withdrawn and judgment rendered against him for \$420.10.

This coming to the knowledge of the interpleaders, defendants in error, they moved the court to set aside the default and judgment and to be allowed to defend in the name of Ayling. This motion the court decided on the final trial, holding the interplea well taken, dismissing the attachment and setting aside the judgment of the plaintiffs in error.

The only questions in the case are, can a creditor bring an attachment against his debtor's property when no part of his claim is due? And can a creditor, who has judgment against the common debtor, interplead in the attachment suit and procure a judgment to be set aside, obtained by default on a claim not yet due?

Again, if a debt has not yet matured when the attachment suit is commenced, shall the claim be postponed to a junior attachment creditor where the debt is due?

We think the court below correctly held in the affirmative on these points.

This ruling seems to be supported by an overwhelming weight of authority. Drake on Attachments, 5th Ed., Secs. 273, 274.

On the last point we cite cases identical in their facts: *Hale v. Chandler*, 3 Mich. 531; *Ward v. Howard*, 12 Ohio S.

158; Patrick v. Mantader, 13 Cal. 434; Fredenburg v. Pearson, 18 Cal. 152; Davis v. Apinger, Ibid. 378; Swift v. Croker, 21 Pick. 241; Pearce v. Johnson, 6 Mass. 242; Smith v. Gettinger, 3 Georgia, 141; Hale v. Chandler, 3 Gibbs, 531; Henderson, Tenny & Son v. Thompson, 37 Miss. 448; Walker & Bradford v. Roberts, 4th Rich (S. C.), 561; Ayers v. Husted, 15 Conn. 504; McOney v. Jackson, 6 Grattan (Va.), 96.

It is insisted by counsel for plaintiffs in error that the taking of judgment in an attachment issued against a defendant where the debt is not due, is a mere irregularity in the proceeding, of which no other attaching creditor against the same debtor can complain, and cites the case of Thomas v. Mueller, 106 Ill. 44.

We are inclined not to take that view of the case.

An attaching creditor, before he can procure an attachment writ, must, according to the requirements of our statute, file an affidavit setting forth, among other things, that the debt on which suit is being brought is then due.

To make an affidavit of this kind in this case would be false and fraudulent as to other attaching creditors.

The mere omission of the debtor to make defense, and the allowing of judgment to go against him by default, would not in any way condone such fraud. And a creditor whose debt was due, having issued his writ and procured the levy of his attachment, ought not to be defeated by a subsequent agreement between another attaching creditor with the same debtor to expedite the time of his debt becoming due. We think the case of Thomas v. Mueller, *supra*, is not in point, as there the only question was whether the defendant in the attachment was obliged to insist on a release of her debt where there had been in fact no payment. The court held she need not, and that other creditors could not set up such release to defeat a junior judgment.

It will be observed that there would have been no equity in insisting on such a release, and if the debtor was honest enough not to do so, it ought not to be permitted to others to interpose it.

We see no error in the record, and the judgment is therefore affirmed.

Judgment affirmed.

Farley v C., B. & N. R. R. Co.

DAVID S. FARLEY, TREASURER, ETC.,

v.

THE CHICAGO, BURLINGTON & NORTHERN RAILROAD
COMPANY.

County Treasurers—Fees—Money Paid under Eminent Domain Act.

County treasurers are not entitled to two per cent commission, under Sec. 23, Chap. 53, R. S., for receiving and paying out money paid into the treasury in condemnations proceedings, under the Eminent Domain Act. (Sec. 14, Chap. 47, R. S.)

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Jo Daviess County; the
Hon. JAMES H. CARTWRIGHT, Judge, presiding.

This was a proceeding commenced by motion filed by appellee in vacation, after the February term, 1889, of the Circuit Court of Jo Daviess, for rule to be entered against appellant, commanding him to pay over to the appellee the sum of \$40,000, deposited with Richard A. Oliver, appellant's successor in office, as the treasurer of said county, in March, A. D. 1886, by appellee, in conformity with Sec. 14 of the "Eminent Domain Act." Appellee had sought to condemn certain property belonging to the Illinois Central Railroad Company in said county, and the above amount was the award of the jury in said condemnation proceeding. The Illinois Central Railroad Company refused to accept said sum as damages, and appealed to the Supreme Court of Illinois, and obtained a reversal on the ground that the property sought to be taken was not subject to condemnation.

Subsequently these two railroad companies made an amicable settlement of their difficulties, and agreed that appellee might withdraw said sum of \$40,000 from said treasurer, and retain the same for its own use.

This money had in the meantime, to wit, three years, remained in the custody of the treasurer of Jo Daviess county, having been paid over by appellee to Richard A. Oliver, then treasurer, and by him, on December 22, 1886, turned over to his successor, the appellant. The parties herein previously having agreed to submit said motion without process or pleadings, stipulated that said motion should be heard in chambers in vacation, after the February term of said court, before his Honor, James H. Cartwright, one of the judges of said court, and that the order of the court on said hearing be entered as of the May term of said court. An agreed statement of facts was submitted, together with certain testimony taken before the master. Said cause was accordingly heard by said judge in chambers, the arguments being made on the agreed facts and testimony submitted, all of which appears in the record, and on said hearing the court made an order commanding appellant to pay over to appellee all of said \$40,000. To which order and decision the defendant excepted, and prayed this appeal.

Messrs. THOMAS H. HODSON and WILLIAM W. WAGDIN, for appellant.

Messrs. M. Y. JOHNSON and LOSEY & WOODWARD, for appellee.

LACEY, J. The only question in the case is as to whether the appellant was entitled to a commission of two per cent on the amount so paid in by the appellee, one per cent for receiving, and one per cent for paying out, under Sec. 23, of Chap. 53, of the Revised Statutes, or whether he was entitled to any fee whatever.

In determining the question it will be necessary to examine this section of the statute as well as Sec. 14, Chap. 47, R. S.—the “Eminent Domain Act.” The section first above cited provides that “county treasurers shall be allowed, in counties of the first and second class, one per cent for receiving and one per cent for paying out all moneys, county orders and jury cer-

tificates received and paid over by them." The latter section provides that "the payment of the compensation adjudged may in all cases be made to the county treasurer, who shall, on demand, pay the same to the party entitled thereto, taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian." The former statute was passed March 29, 1872, and the latter April 10, 1872. We do not think the two acts can be regarded as *in pari materia* but even if they should be so regarded it would not be necessary to construe them in the manner contended for by appellant. The supposed great hardship and unreasonableness of requiring the county treasurer to receive condemnation money and hold and pay it out without compensation, is strongly insisted upon by counsel for appellant as a strong reason why the two statutes should receive the construction he insists on, the liability of the fund to pay fees. Such consideration, however, even when well founded, can never supply the face of a statute. But in this case we can not see any great hardship as far as the county treasurer is concerned, whether he is allowed fees out of such fund or not. His salary is fixed by the county board and can be neither increased or diminished by the receiving or not receiving compensation like this, unless in the very remote contingency of his earnings not equaling his salary. But this would probably never happen in any of the counties of the second class in this State. In Jo Daviess county the salary of the treasurer is said to be fixed by the county board at \$1,200 per annum. If any one is to be benefited it is the county and not the treasurer; and the Legislature being aware of this condition of things, would not reasonably desire the counties to earn money by acting as the collector for moneys to be paid into the county treasury in cases like this. Condemnation money under the act in question is paid into the county treasury voluntarily on the part of the parties asking the condemnation. It is no part of the general revenues of the county or of any of the various municipalities organized in the county. It is insisted by counsel for appellant that the fact that in the revision act of 1872, the words as they appeared in the former act, "re-

ceived by them (county treasurers) for county purposes," were so changed as to read "received by them," would so enlarge it as to entitle county treasurers to collect fees on all moneys paid into their hands from any sources whatever. But we think it may be insisted with much force that nothing more was intended by the change than to empower the treasurer to collect fees from the various moneys raised by taxation in the county by municipal bodies other than the county, and where such moneys might legally come into the hands of the treasurer. The "Eminent Domain Act" had not then been passed.

But however this may be regarded, or whether the treasurer would be liable on his official bond for the safe-keeping of the condemnation money, we think it is clear that Sec. 14 of Chap. 44, above cited, excludes the idea that the treasurer may charge fees for receiving and paying out the same. The entire amount by this act is required to be paid out to the party entitled to it without any provision for the payment of fees, and to hold that fees may be deducted by the treasurer would be to interpolate words of important purport into the act not there found. This we think would be unwarranted, and extending the rules of construction too far. Sec. 14, Chap. 47, therefore, must be regarded as a modification of, or exception to Sec. 23, Chap. 53, as far as the question of the treasurer's right to collect fees from such deposit money is concerned, even if without that he would have such right. It is not uncommon for the Legislature to impose burdens on officers not existing when the office is created, and for which no fees are allowed, the idea being that such officer is fully compensated by other fees. Public officers take their offices *cum onere*, which they well know when elected. Of such class of duties is the reception and safe-keeping of sums of money paid into the county treasury belonging to estates of deceased parties not called for, for which no fee is allowed to the treasurer. Secs. 2 and 7, Chap. 49, R. S. The fact that the party depositing the condemnation fund in question afterward desires to withdraw it can not change the character of the transaction. The money in question was deposited under the

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provisions of the "Eminent Domain Act," and it will not lose its character as such fund, no difference who desires to withdraw it. Even if there were a mistake in so placing it the depositor would have a right to withdraw it without paying fees. It was a deposition under the act made in good faith and received by the treasurer as such. We are satisfied that the court below did not err in its judgment.

The judgment is therefore affirmed.

Judgment affirmed.

WILLIAM DRURY ET AL.

V.

LUCIUS J. HENDERSON.

Limitations—New Promise—Evidence.

1. Payments on a note, or the execution of a mortgage as additional security, revive the note for the period provided in the Statute of Limitations, in force at the time of such payments, and not at the time the note was made.

2. A letter from the maker containing a conditional promise to pay a note, without proof of acceptance of the condition by the payee, is not sufficient to stop the running of the Statute of Limitations.

3. The payee's indorsement on a note of the payment of interest is not sufficient to stop the running of the statute.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. JAMES H. CONNELL, for appellant.

Mr. THOMAS E. MILCHREIST, for appellee.

UPTON, P. J. This was a bill in equity commenced by appellants against appellee on the 24th day of March, 1888, brought to foreclose a trust deed (mortgage), executed by the

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late James Henderson and his wife, Julia Henderson, now deceased, of whose estate the appellee is the son and only heir at law; said deed having been executed to one Amos F. Watterman as trustee, who is also deceased, upon certain lots and blocks in the south addition to Aledo, in said county of Mercer, and given to secure a note for the sum of \$800, dated May 20, 1870, payable to one William Drury in one year after date thereof, with interest at ten per cent per annum after maturity; the deed of trust bearing even date with the said note, executed at the same time and duly recorded.

Afterward, and on the 20th day of December, 1872, the above named James Henderson and Julia, his wife, to further secure the payment of the note before described, made, executed and delivered another mortgage deed to the above named William Drury, to a certain other outlot in the same addition to the town or village of Aledo.

On the 17th of October, 1873, James Henderson executed to William Drury another note for the sum of \$150, payable six months after date, with interest at ten per cent per annum after maturity, and to secure the payment thereof James Henderson and his wife, Julia, executed a trust deed to one William A. Lorimer as trustee, to certain other real estate in the south addition to Aledo.

The bill was filed to foreclose the above mentioned trust deeds and mortgage, and alleged the execution, delivery and record thereof, the non-payment of the notes or either of them, or the interest thereon, except the interest upon the \$800 note, which was alleged to have been paid up to May 20, 1874, and indorsed upon the note.

The appellee by plea and answer filed, interposed the statute of limitations approved April 4, 1872, in force July 1, 1872, to which appellant replied, a new promise.

The cause was referred to the master to take proofs, etc., and compute the interest, etc., who, after hearing the evidence, filed his report, to which were filed exceptions by the appellees. The court found the right of action was barred by the statute of limitations, entered its decree dismissing the bill, from which order and decree an appeal was taken to this

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court, and the only question presented in this record is, did the court err in holding the appellant's cause of action barred by the statute of limitations.

It is admitted that the cause of action as to both notes was barred by the statute, unless removed by a new promise. It will be seen that the \$800 note, of date of May 20, 1870, falls within the limitation act of 1849, which was sixteen years and, not falling due until one year after date, would be barred in May, 1887, unless revived.

To take the case out of the statute, the appellant introduced in evidence a further mortgage on other property, given by James Henderson and Julia, his wife, to Wm. Drury, the payee of the \$800 note, executed December 10, 1872; the alleged payment of interest was indorsed upon the note annually, from 1871 to 1874; also indorsements reciting the same were made by an encyclopædia, had by Wm. Drury from James Henderson, in the year 1876, and annual or yearly subsequent parts thereof, in 1877, and in services claimed to have been rendered in 1879 and 1880. A letter was also put in evidence, of date April 6, 1876, from James Henderson to Drury, in substance proposing that if the appellant, Drury, would release the mortgage on the lots and take a second mortgage thereon, for the balance due him (Drury), that Henderson would borrow \$700 and pay him what he owed him. The appellant relied upon an implied new promise, arising out of and predicated upon the fact of these payments, or some one or more of them, having been, in fact, made by James Henderson upon the \$800 note, within sixteen years prior to March 4, 1888. The burden of establishing that fact of a new promise was upon appellant.

Upon this issue of a new promise, and upon the several alleged facts herein stated, the trial court, by its decree, found that a new promise was not sustained by the proof.

The mortgage, given as further security for the note of \$800, was executed, as we have seen, December 10, 1872, and of necessity was governed, as we think, by the limitation act of 1872, in force July 1, 1872, which was ten years. If this be so, that could not be of aid to appellant in this contention.

Baldwin v. Baldwin, 26 Ill. App. 176; Ziegler v. Tennery, 23 Ill. App. 133.

The payment of the different installments of interest indorsed upon the note was not proven, except by the indorsements, and those were all made in the handwriting of William Drury, the payee and holder of the note, which was not sufficient. William Drury was not a competent witness under the statute. Sec. 2, Chapter 51, R. S. (S. & C.), title, Evidence and Depositions; Lowery v. Gear, 32 Ill. 383; Connelly v. Pierson, 4 Gilm. 108.

The payments claimed by the indorsements of the books, labor, etc., are not such proof of a new promise as is required by the statute in force when these alleged payments were claimed to have been made, nor is the fact of any such payment having been made specifically to be applied upon this note, shown by the evidence in the case. Sec. 16, Chap. 83, R. S. (S. & C.); Lowery v. Gear, *supra*; Connelly v. Pierson, *supra*; Baldwin v. Baldwin, *supra*; Ziegler v. Tennery, *supra*.

The letter under date April 6, 1879, introduced in the trial court, is at most but a conditional promise with no proof of acceptance of the condition, and was not sufficient, under the statute before cited, to establish a new promise. Kallenbach v. Dickinson, 100 Ill. 428; Lowery v. Gear, *supra*; Wachter v. Albee, Adm'x, 80 Ill. 47.

What we have said applies with equal, if not greater force to the other notes secured by the other mortgages and deeds of trust in the bill of complaint stated and set forth, and no useful purpose would be served by further discussion concerning them, as we are fully satisfied the statute of limitations had run upon, and was a bar to any recovery upon the several causes of action in the bill stated, when the suit was commenced in the court below, and in our judgment the Circuit Court did not err in dismissing complainants' bill, and that decree is affirmed.

Decree affirmed.

Reed v. Barnum.

PERMELIA E. REED

V.

HENRY M. BARNUM, EXECUTOR.

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Gift Causa Mortis—Construction—Evidence.

1. In this case it is held that the evidence establishes a gift *causa mortis*.
2. A gift of a fund to a trustee with directions to pay the interest thereon to a certain person, without limitation as to the duration of the trust, is, upon the donor's death, equivalent to a gift to such person of the principal.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Stephenson County; the Hon. WM. BROWN, Judge, presiding.

Mr. HORATIO C. BURCHARD, for appellant.

The validity of gifts made under similar conditions has been sustained by many, and nearly uniform decisions of the highest State courts, including our own.

It has been held in Pennsylvania (Nicholas v. Adams, 2 Wharton, 17), that assenting to the statement "if you die Nicholas is to have the watches; if you recover, they are to be returned to you," the watches then being delivered, is a good *donatio causa mortis*; in Indiana (Baker v. Williams, 34 Ind. 547), that where money was placed by a soldier in the hands of S, a third person, with the declaration that if he, the soldier, "should return alive it should be repaid to him, but if he should not return alive and claim the money S should pay it over to the soldier's sister," it was held a completed delivery and valid gift to the sister; also in Wyblee v. McPeters, 52 Ind. 393, a delivery of bonds and money to B with directions by the grantor to deliver them upon his death to certain of his grandchildren, was held good, and that an action would lie against B upon his refusal to execute the trust; in New York (Grymes v. Hone, 49 N. Y. 19), that the declaration of the donor that his wife should keep the assignment (of a cer-

tificate of shares of stock) and "not hand it over till after his death, as he did not know what might happen, nor but that they might need it," was simply a statement of the law as to such gift, whether the declaration was or was not made. In Wisconsin (*Henschall v. Maurer*, 69 Wis. 576), the holder of a note and mortgage, in expectation of death, to avoid the expense of making a will, delivered to Maurer the note and mortgage and executed satisfaction, with directions to deliver them, after his death, to the maker; held, the satisfaction and delivery constituted, as matter of law, a valid gift *causa mortis*. In Tennessee (*Goss v. Simpson*, 4 Cold. 288), Carter, having enlisted in the army, when about to leave home placed a sum of money and notes and receipts in the hands of Mary Simpson, his sister, stating that if he never returned he wanted it all to be given to her son George. He died in the service; held, a good *donatio causa mortis*. In Michigan (*Bostwick v. Mahaffy*, 48 Mich. 342), an invalid gave directions to his amanuensis that certain money should, at his death, be paid over to his daughter; held, a valid *donatio causa mortis*. In New Hampshire (*Jones v. Brown*, 34 N. H. 439), keys were delivered to Mrs. Fitts with directions "to deliver them after the death" of the donor to her nieces; the drawers contained money and bedding, and donor said she wanted nieces to have the things in the house. Mrs. Fitts took and kept keys until after donor's death, and then gave them to nieces; held, a good *donatio causa mortis*. In Vermont (*Blanchard v. Sheldon*, 43 Vt. 512), where Sheldon had promised in writing "to pay Aurilla Ballou \$300, with annual interest, if she called for it before she deceased, and if not, to be paid to Daniel M. Blanchard by her order," and Aurilla Ballou died without having called for it, the court, in sustaining Blanchard's right to the money, said: "We do not see upon principle how a gift, if absolute and delivered to a third person for the donee, but not to be delivered to the donee till the happening of some event, or if liable to be defeated if a certain event occurs, is any the less a valid gift." In Maine (*Hill v. Stevens*, 63 Me. 364), a savings bank book was delivered to a third person, saying: "I give the money in that

bank on that book to Harriet and Isabella, and want you to take the book and take care of it, and after my decease divide the money equally between them;" held, a valid gift. In Kentucky (*Merriweather v. Morrison*, 78 Ky. 573), Merriweather indorsed two notes to Agnes Morrison, and handed them to third person, telling him to hand them to her after his death; held, a complete delivery and valid gift. In Massachusetts (*Clough v. Clough*, 117 Mass. 83) the delivery of \$400, during the last sickness, to a brother, with directions to invest and hold it until a son became of age, was held to be a good *donatio causa mortis*. A later decision, *Turner v. Easterbrook*, 129 Mass. 425, is a still stronger case for appellant.

Gifts *causa mortis*, under conditions involving the same questions, have been sustained in other cases in the States above named and in Connecticut, Delaware, Maryland, Mississippi, Iowa and Illinois, but further reference seems unnecessary, except to *Virgin v. Gaither*, 42 Ill. 39, and *Woodburn v. Woodburn*, 123 Ill. 608; also *Comer v. Comer*, 24 Ill. App. 526.

Mr. HENRY C. HYDE, for appellee.

There was no gift, because, by her letter to Barton, Mrs. Davis parted with none of her rights in the property during her life. The legal and equitable title, as well as the possession, remained in her till her death.

The books contain many definitions of a gift *mortis causa*. Some of them are confined to a statement of what the donor must do to make such a gift, and the circumstances under which it must be made. But others go further, and include the conditions subsequent which the law attaches to the gift, thus creating some confusion, unless care is used to distinguish between what the donor is required to do in making the gift and the conditions subsequent. There is really but one thing which, in the making of a gift *mortis causa*, distinguishes it from a gift *inter vivos*, namely, it must be made in anticipation of death near at hand. In every other respect the same things are essential in making both gifts. After a gift *mortis*

causa has been made as complete and perfect in all respects as is required in the case of a gift *inter vivos*, then the law attaches to the former two conditions which do not apply to the latter, namely—it can be reclaimed by the donor before his death, and his recovery from the impending peril revokes it.

But in making either gift the donor must part with the possession of the subject of the gift, and divest himself of all present interest, dominion and control over it as the owner. The right which had been in the donor must *eo instanti* of the gift be vested in the donee. The conditions subsequent which the law attaches to a gift *mortis causa* permitting the donor to reclaim the gift, and revoking it in the event of his recovery, do not change or affect this rule. If the donor could make a gift *mortis causa*, and retain the possession of, and control over, the subject of the gift, then there would be no use for or sense in these conditions permitting him to reclaim the gift and revoking it on his recovery, for there would be nothing for the conditions to operate upon—nothing to reclaim, nothing to be revoked, no gift. A gift made to take effect upon the death of the donor, when the subject of the gift remains in the possession or under the control of the donor, can not be sustained either as a gift *inter vivos* or *mortis causa*; it is nothing but an attempted testamentary disposition of the property. All the leading cases, when these questions have been fairly presented and carefully considered, sustain these views. *Basket v. Hassell*, 17 Otto, 602; *Young v. Young et al.*, 80 N. Y. 422; *Martin v. Funk et al.*, 75 N. Y. 134; *Walter et al. v. Ford*, 74 Mo. 195; *Daniel et al. v. Smith, Adm'r, et al.*, 64 Cal. 346; *Hatch v. Atkinson et al.*, 56 Me. 324; *Gano v. Fisk*, 43 Ohio St. 462; *Cline et al. v. Jones et al.*, 111 Ill. 563; *Barnes v. The People*, 25 Ill. App. 136.

C. B. SMITH, J. This was a bill in equity, brought by Henry M. Barnum against Edward P. Barton and Permelia E. Reed. Barnum was the executor of Mary L. Davis, who died testate on the 28th of May, 1889, leaving no husband, children or descendants of children. The will of Mary L.

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Davis was duly probated and Barnum appointed executor. No question arises out of the will. After Barnum entered on his duty as executor he found certain notes and certificates of deposit in a bank in the hands of Edward P. Barton, which Barnum claimed to belong to the estate of Mary L. Davis, and demanded of Barton that he surrender them to him as executor of Mary L. Davis. Mr. Barton being in doubt as to whether these notes and bank certificates of deposit which he then held belonged to the estate of Mrs. Davis or to Mrs. Permelia E. Reed, declined to surrender them to the executor without an order of the court requiring him to do so. Mrs. Permelia E. Reed was a sister of Mrs. Davis and also claimed to be the owner of these notes and certificates of deposit, and hence this bill is filed to compel Barton to surrender these papers, and for the further purpose of declaring that Mrs. Reed is not the owner of them, and has no interest in them except as she shares in the estate of her sister under the will. The papers in controversy in this suit are as follows: Three certificates of deposit in the Second National Bank of Freeport, one for \$1,700, dated Nov. 23, 1888, one for \$60 Dec. 6, 1888, and one for \$90 Jan. 5, 1889, all drawing interest at three per cent. One note of G. P. Kingsley Nov. 13, 1884, \$2,000, and one note of E. P. Barton May 28, 1888, for \$2,000. These certificates and notes are made exhibits to the bill. The bill sets up that the only claim Barton has to the papers in question is by virtue of the following letter addressed to him by Mrs. Mary L. Davis, viz.:

13 (Exhibit I). Letter of Mary L. Davis to Edward P. Barton, as follows:

“ROCK CITY, April 1, 1889.

“HON. E. P. BARTON:—I may not live many days or hours, and so write to you at once a few words at a time as I can, Inclosed you will find your note, Kingsley's note and the certificates on the bank. The interest is not due until May, and about the same time. But I send them now because they are safe with you and I can give you directions now. I wish you to take enough of the interest money and the \$50 which you will find inclosed, to bring the new certificate up

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to \$2,000, and if I am dead, of which you will be duly apprised, draw it in my sister's name, Mrs. Permelia Estes Reed, and send the interest, and the notes and interest on them, to her, as long as they continue, and when they are paid put them in the bank and send the interest to her. The remainder of the interest, due in May, send to me if alive, if not, to her. If I was strong enough I would entirely revise my will. Send me word if you get these papers and this money safely, so it may be off my mind. Good-bye.

“Respectfully,

“M. L. DAVIS.”

Barton, in his answer, admits that the above letter contained all the authority and title he had to said papers, and constituted his only authority for holding them. He also makes as a part of his answer his reply to the above letter, showing his acceptance of the charge or trust or duty imposed upon him by the letter of Mrs. Davis. His reply was in the following words, viz.:

FREEPORT, ILL., April 2, 1889.

MRS. MARY L. DAVIS. Dear friend:—I received by yesterday's mail from you certificates of deposit to you from Second National Bank.

1st certificate for	\$1,700; dated November 23, 1888.
2d “ “	60; “ December 6, 1888.
3d “ “	90; “ January 5, 1889.
4th note to you from me	2,000; “ May 28, 1889.
6th note to you from G.	
P. Kingsley	2,000; “ November 18, 1884.
6th cash	60;

Total \$5,900.

Received same to collect interest when due on the notes in May next and on the \$1,700 certificate, and to return to you if alive the two notes, a certificate of Second National Bank for \$2,000, and the balance of the money. If you are dead when the interest matures in May, then I am to follow your letter of instructions in favor of Mrs. Permelia Estes Reed.

I am sorry to learn that you are feeling so uncertain of life.

Reed v. Barnum.

The darkest time is just before the day. I hope you will recover at least your usual health.

Yours,

E. P. BARTON.

E. P. Barton, in his answer, declares his willingness to deliver these papers to such persons as the court shall direct.

The answer of Mrs. Permelia Reed avers that at the time the letter to Judge Barton was written, and for a long time prior thereto, her sister, Mrs. Davis, had been an invalid and had lived a good deal of her time with Mrs. Reed, and that she had taken a great deal of care of her when she was helpless, and that her sister, Mrs. Davis, had informed her just before this letter was written to Judge Barton that she intended to give her the money represented by these notes and certificates, for her care and attention, in addition to what had been given in the will, and that in carrying out that purpose Mrs. Davis sent these papers to Judge Barton with the instructions therein contained, and that Barton accepted the trust to hold these papers for appellant and apply them as directed by his letter to Mrs. Davis.

Appellant, Mrs. Reed, contends that this letter of Mrs. Davis to Judge Barton operated as a *donatio mortis causa*, or gift in expectation of death, and that the delivery of the property to him, and his acceptance thereof, amounted to a complete delivery to him for the use of appellant, and so constituted him a trustee or agent for appellant.

Issue was joined on these answers and the cause heard before the court. On the hearing the court found against the claim of Mrs. Reed, and found that the letter to Barton and his reply did not operate to divest Mrs. Davis of the property, and found that the money, notes and certificates constituted a part of the estate of Mrs. Davis, and that neither Mrs. Reed nor Barton was the owner thereof, and directed Judge Barton to deliver them to the administrator.

From that decree Mrs. Reed only presents this appeal and assigns for error the decree of the court in not finding that she was the owner of the property in controversy.

The only question before us, therefore, is to determine

whether the letter of Mrs. Davis to Judge Barton amounts to a gift *causa mortis*, and if not such a gift, so as to entitle Mrs. Reed to the absolute ownership and possession of the property, then whether it creates a trust in the hands of Judge Barton for the use of Mrs. Reed, to be executed and administered under the direction of the court.

The evidence taken on the trial showed that Mrs. Davis had been for some considerable time before her death an inmate of Mrs. Reed's house, and that she was almost, if not entirely, helpless for about six months before her death, and that she was constantly and tenderly cared for day and night by Mrs. Reed, who was her only sister. It is also in proof that for a good while before Mrs. Davis left her own house she was an invalid, and that Mrs. Reed spent a good deal of time with her in her own home taking care of her. There is also evidence showing her declaration within a day or so, and the very night before she wrote the letter to Judge Barton, that her sister should have pay for all her trouble and bother and that she should have all her personal effects. The proof is that Mrs. Davis wanted her sister to be with her. In the light of these circumstances we can have little doubt about the intention and purpose of Mrs. Davis when she wrote the letter, to make an absolute gift of all the property to her sister. But if it be conceded that parol evidence of antecedent declarations of Mrs. Davis are not admissible to explain or aid in the construction of the letter by showing her intention, and if we exclude all such declarations, taking the letter and construing it alone by what appears on its face without the aid of these extrinsic circumstances, we still think it reasonably certain and clear that Mrs. Davis intended to make her sister an absolute gift *causa mortis*, of all this property, both principal and interest.

She starts out with the declaration that she does not expect to live but a few days and perhaps but a few hours. She has made a will, but still desires to make some different disposition of this property while living. She directs that out of the money she incloses and the interest derived from the notes, the \$1,700 certificate shall be raised to \$2,000, and in

case of her death, this \$2,000 certificate shall be issued by the bank in the name of her sister, Mrs. Reed, and she directs that the interest on this new certificate and the notes and the interest on the notes, shall be sent to Mrs. Reed, as long as they continue, and when they are paid their proceeds are to be put in the bank and the interest sent to Mrs. Reed. Just here the only difficulty in construing this letter arises, from an apparent failure on the part of Mrs. Davis to make any express disposition of the principal arising from the payment of all these sums, and after it is placed in the bank. After the money is all deposited in the bank, Barton is directed to send the interest to Mrs. Reed, without anything further being said as to the principal. But we think when all the parts of this instrument are considered together this difficulty is more apparent than real, and is not of controlling significance. The new certificate is to be issued in the name of Mrs. Reed. This direction as to that sum amounts to a clear legal transfer and assignment of the title of that amount of money to Mrs. Reed; when that certificate was issued to Mrs. Reed by the bank, she became absolutely the legal owner of that money, and had the right to reduce it to possession, unless there was some very clear expression found in the letter (and there is none) limiting such legal right. We must presume that the donor intended the legal consequences to follow her directions, and when she directs in unequivocal terms, that a certificate shall be issued to her sister for \$2,000 in her own name, we are bound to presume she intended her sister to hold the legal title.

Now as to the notes; while there is no direction that these notes shall be assigned to her sister, still there is a clear and positive direction that they shall be sent to her and delivered to her. Not only the principal represented by these several papers, but also the interest is to be sent to her sister. She is to be invested with the possession of them. While the delivery of these notes unassigned to Mrs. Reed would not transfer to her the naked legal title, still it was sufficient to invest her with the equitable title and beneficial interest (*Woodburn v. Woodburn*, 123 Ill. 608,) so as to enable her to collect

them in a suit in the name of Mrs. Davis for her own use, and by that means reduce the proceeds of the notes to her use. As to the certificates, she had the legal title when it was issued, or if not issued in that way it was the duty of Judge Barton to have it so issued, and the legal title carried with it the right of possession to Mrs. Reed. As to the notes, while the legal title did not pass by mere possession and delivery, still the rightful possession of Mrs. Reed, which she was and is entitled to have under this letter, invested her with the equitable title to the notes.

The clear legal effect, then, of the directions of Mrs. Davis in the body of this letter, is to invest Mrs. Reed with the legal and equitable title to all this property, and hence the failure or omission to state at the conclusion of the letter what shall be done with the aggregate amount after being placed in the bank, can not be regarded as a failure on the part of Mrs. Davis to dispose of the principal. Nor is the fact that she directs Judge Barton to place the proceeds of the notes and certificates in the bank, when paid, and to then send the interest to her sister, so inconsistent with the prior expressions investing her sister with the title to the property as to overthrow such title or to defeat the gift. We think this latter clause simply means that Judge Barton should look after the fund after the death of her sister until it should be reduced to money and placed in the bank.

While there is no express direction as to whose name or credit the final deposit in the bank should be made in, still we think it reasonably certain that she intended the deposit to be made in the name of her sister, Mrs. Reed. She did not expect to live to the time when the deposit should be made. She had already invested her sister with the legal title to some of it and the equitable title to the remainder, and it would seem to follow, as a legal necessity, that the deposit should be made in the name of Mrs. Reed.

We think, also, that this direction to send the interest to Mrs. Reed after the final deposit in the bank should be made, of the gross proceeds of these notes and certificate, will not be, as the construction contended for by appellee, that Barton

Reed v. Barnum.

was to retain indefinite control of the fund and interest. We think this instruction to put the money in the bank and send the interest to Mrs. Reed simply meant that whatever interest the principal fund had earned at the time of the deposit should then be sent to Mrs. Reed, and not deposited with the principal, and that it was intended after he made the deposit of the principal and sent the interest to Mrs. Reed, then his connection with the whole matter should cease, and that Mrs. Reed should thereafter manage her own money as she liked. Adopting this construction the whole letter becomes reasonable and consistent and seems to be in harmony with the wishes of Mrs. Davis. Any other view enforces one or the other of two doubtful constructions: either, first, that the principal is intestate estate, or that a perpetual trust has been created for the benefit of Mrs. Reed, either of which construction seems to be inconsistent with the letter and spirit of the whole instrument. We think the letter falls within the definition of a gift *causa mortis* as defined by this court in the case of *Roberts v. Droper*, 18 App. Ct. 167. We there held that "a gift *causa mortis* is defined to be a gift of personal property made by one in expectation of death then imminent, and upon an essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise." 2 Schouler on Personal Property, Sec. 135. Blackstone defines it to be a gift by a person in his last sickness apprehending his dissolution near. 2 Black. 514. And this view of the law seems to be in harmony with the very great weight of the authorities. *Wyblee v. McPeters*, 52 Ind. 393; *Baker v. Williams*, 34 Ind. 547; *Postwick v. Mehaffy*, 46 Mich. 342; *Virgin v. Gaither*, 42 Ill. 39; *Woodburn v. Woodburn*, 123 Ill. 609; *Seavy v. Seavy*, App. Ct., 2d District, opinion filed May 25, 1889.

This last case is very similar to the one at bar in its facts. But if we should concede that the letter to Judge Barton only directs that the interest on the gross sum shall be paid Mrs. Reed, then one of two conclusions seems inevitable; either that the donor meant that he should pay her but the amount

of interest in his hands at the time of the deposit of the gross proceeds of the certificate of deposit and notes, and that his agency or charge of the fund should then cease, or that his agency or management of the fund and payment of interest to Mrs. Reed should be without any limitation, and therefore perpetual. We have already seen that if we adopt the first construction then it results that the management, title and possession of the fund would go at once to Mrs. Reed. If we adopt the latter conclusion then the gift amounts to a perpetual use of the principal thing granted, without any limitation or restraining words, and therefore is equivalent to and in legal effect is a grant or gift of the money itself. If A grants or gives to B a piece of land to be used and enjoyed forever, that amounts to a gift of the land itself, although the use only is expressed, because the perpetual use is entirely inconsistent with any kind of right or title existing in any one else. So the gift of the perpetual use of a chattel necessarily carries with it the absolute ownership of the chattel, and for the same reason.

So here, if it be held that this letter confers on Mrs. Reed a perpetual right to have the interest on this money, then it is utterly impossible that any other person could ever take away the principal or any part of it for any purpose, for that would defeat the beneficial right of Mrs. Reed to enjoy the interest. For these reasons the law treats all such grants or gifts of the perpetual use of a thing as equivalent to a grant or gift of the thing itself. So, by adopting either construction of the paper we reach the same conclusion, that Mrs. Reed is the absolute owner of and entitled to the possession of this money.

While it may be conceded that the letter in question is not entirely free from all doubt and difficulty of construction it must also be remembered that the burden of establishing his claim to this property rests in the administrator, Barton, to show his right to it. It is not found in the possession of his intestate, and before he can get it he must show a clear right to it.

We think he fails in this. The most favorable attitude he

can occupy under the proof in the case is that it is doubtful what the meaning of the letter is, and that the right as between him and Barton and Mrs. Reed is doubtful. His testatrix parted with the possession, and adverse possession considered alone, is strong presumptive evidence against the executor. In any view of the case we have been able to take we think the executor fails to establish any right to this property.

Whether Barton's duty and control over the fund is ended and that it is his duty to hand it over to Mrs. Reed, as we think it is, or whether he is a trustee in perpetuity or otherwise over the fund for the benefit of Mrs. Reed, can not concern the administrator. It is sufficient to defeat his bill that he fails to show any title or right to the fund.

Mrs. Reed makes her answer a cross-bill as well, and asks that Judge Barton be declared to hold said money and funds as her trustee, and that he be directed to execute and discharge his trust by delivering and paying over to her the certificates and notes described in said letter, or the proceeds thereof when collected. We think she is entitled to this relief and that the certificates and notes, or their proceeds, should be delivered to her as her own absolute property.

In decreeing as it did and in refusing to grant relief prayed for by Mrs. Reed the court erred. The decree of the Circuit Court will therefore be reversed and the cause remanded, with directions to dismiss the bill for want of equity, and to grant the relief prayed for by Mrs. Reed in her cross-bill, and direct Judge Barton to deliver her the notes and certificates if they have not been reduced to money, and if they have, then to pay her the money, less any reasonable charges against said fund which Judge Barton may be entitled to, if any, for his fees or charges for taking care of said fund. If he has used the said fund or any part of it, or received interest thereon from the bank or otherwise, then he will be chargeable with such use or interest at such rate as the court shall deem right and just.

Reversed and remanded.

DENNIS RYAN

v.

GEORGE W. NEWCOMB ET AL.

Appeal and Error.

This court, upon examination of the record and abstracts, holds that the decree appealed from was in accordance with the remanding order of the Supreme Court, and there being no error in the record, affirms the decree.

[Opinion filed May 28, 1890.]

IN ERROR to the Circuit Court of Kankakee County; the
HON. ALFRED SAMPLE, Judge, presiding.

Mr. D. F. TRAINOR, for plaintiff in error.

Messrs. C. H. & C. B. WOOD, for defendants in error.

Per Curiam. We have examined the record in this case, abstracts and briefs, and carefully considered the questions involved under the assignments of error, and fail to find any error in this record. It is complained that under the remanding order of the Supreme Court the decree rendered by the Circuit Court is for too much money, and according to the terms of that order the court should have been confined in rendering its decree to the \$1,400 note and interest secured by the deed of trust; but we think a proper construction of the remanding order would be a direction to the Circuit Court to include in its assessments of damages of the amount due, whatever sums were provided for in the trust deed, as well as upon the face of the note, and that inasmuch as taxes paid by the grantee mentioned in the trust deed were made a charge against the land, and secured by the trust deed, there was no error in allowing whatever the evidence showed the grantee had paid, and adding that sum to the principal and interest provided for upon the face of the note.

36	538
125	91
130	57

Wilson v. Hakes.

Under the evidence and in this view of the remanding order we think there was no error committed and the decree is affirmed.

Decree affirmed.

JOHN H. WILSON

v.

GEORGE M. D. HAKES ET AL.

Mortgages—Insurance for Benefit of Mortgagee—Additional Insurance—Equitable Lien of Mortgagee—Assignment of Policies—Rights of Assignee.

1. An agreement by a mortgagor to insure for the benefit of his mortgagee, gives the latter an equitable lien on the proceeds of all policies taken out by the mortgagor, to the extent of his debt, whether they are taken out for his benefit or not.

2. When mortgaged property is covered by insurance and destroyed by fire, the insurance money represents the property under the mortgage and goes to the mortgagee, to the extent of his debt.

3. If an insurance company after notice of the mortgagee's claim pays the insurance to others, it does so at its peril.

4. The fact that the mortgagee knows that additional insurance is taken out for the benefit of others, and makes no objection, does not affect his rights so long as others are not put in a worse position by his silence.

5. Where insurance policies for the mortgagee's benefit contain the *pro rata* clause, the taking out by the mortgagor of additional insurance for the benefit of others, is a breach of a provision in the mortgage that he will do nothing to change or incumber the lien.

6. The assignee of an insurance policy takes only an equitable assignment, and acquires no greater rights than his assignor.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. C. L. WALKER and G. W. & J. T. KRETZINGER, for
appellant.

36	539
139	392
36	539
58	349
36	539
75	58

Messrs. IRA O. WILKINSON and ADAIR PLEASANTS, for appellees.

C. B. SMITH, J. This was a proceeding in equity, in the Rock Island Circuit Court. The proceedings were had upon an original bill and answers thereto, and upon a cross-bill and answers thereto. Upon a hearing, the court rendered a decree not satisfactory to any of the parties, and both parties to the original and cross-bills have appealed to this court and assigned errors upon the record. The record is very voluminous and the argument of counsel elaborate. In the view we take of the case it will not be necessary to a correct understanding of the case and the legal principles involved, to go at length into all the allegations of the bill, cross-bill and answers, nor to give a detailed account of all the facts appearing in the evidence.

The substantial and material facts disclosed in this record, upon which the rights of the parties turn, are about these: the Rock Island Paper Company, one of the defendants, was a corporation, existing under the laws of this State, on the 20th day of December, 1877. On that day the Paper Company borrowed from John H. Wilson \$10,000, evidenced by ten promissory notes of \$1,000 each, with interest at ten per cent per annum.

To secure this loan the company executed a trust deed to T. J. Robinson, covering all its land, buildings and machinery, and everything appurtenant thereto. This \$10,000 loan seems to have been made up of two loans, each loan to include five of these \$1,000 notes, but they were all secured by the trust deed made to Robinson on the same day. This trust deed was made for the benefit of Wilson as *cestui que trust*. It was recited in said trust deed as follows: "And whereas, the said party of the first part is now improving the mill property owned by it, and hereinafter described, and is about to purchase machinery for the mill now erected thereon, and will be obliged to incur indebtedness for that purpose, and is desirous of securing such indebtedness to the amount of \$5,000, making altogether the sum of \$10,000 secured by these presents."

Wilson v. Hakes.

On the 3d of July, 1878, the Paper Company made another trust deed on the same premises, to secure five \$1,000 bonds or notes bearing that date, payable to Charles A. Walker as trustee, for the benefit of the legal holder of these five bonds. These bonds were due five years after date, at ten per cent per annum. These last five bonds were sold to John H. Wilson. It does not appear very clearly just at what time Mr. Wilson became the owner of these five bonds, but he purchased them directly from the officers of the company, and paid the full face value for them.

Only \$5,000 of the first \$10,000 loan seems to have been paid on the date of the execution of the first trust deed and the notes. The remaining five notes were sold to Mr. Wilson, or, at least, delivered to him, and the money paid to the company some time thereafter.

But we understand from the abstract that all of the ten notes and the trust deed executed to Robinson were executed on the same day, and that the whole series of ten notes was secured by the first trust deed. The first trust deed was recorded December 27, 1877, and the second one July 11, 1878. Each of these trust deeds contained the following provisions, viz.: "The party of the first part further agrees for itself and its assigns to and with the party of the second part, trustee as aforesaid, his heirs and assigns, that it will at all times hereafter, until the indebtedness secured by this trust deed is fully paid, pay and discharge all taxes assessed on said premises, with the appurtenances and machinery aforesaid; that it will keep said premises and machinery insured in some one or more responsible insurance companies in an amount sufficient to secure said indebtedness."

In another claim of said trust deed it is provided that "In consideration of the premises, the party of the first part for itself and its assigns, covenants and agrees to and with the said party of the second part, his heirs and assigns, that during the continuance of the lien secured by this trust deed, it will not do or cause to be done anything whereby the value of the premises hereby conveyed shall be in any manner impeached or affected, and the lien hereby created changed or incumbered."

In compliance with the above recited covenants in these trust deeds, the Paper Company, soon after the trust deeds were executed, took out insurance to the amount of \$10,000, which was made payable to Robinson, trustee, in the first trust deed, in case of loss by fire, and also took out \$5,000 insurance, payable to Walker, trustee in the second mortgage, aggregating \$15,000, the same being for the benefit of John H. Wilson as *cestui que trust*. This amount of insurance for Wilson was kept good until the property was destroyed by fire on March 9, 1883.

After the above named policies were taken out on the mortgaged property and machinery of the Paper Company for the benefit of Wilson, the Paper Company took out other policies of insurance on the same property, aggregating about \$15,000 over and above those taken out for the benefit of Wilson. After these later policies were taken out by the Paper Company and paid for by it, the company itself provided for the payment of losses, if any, under such policies, to be made to certain persons named on a slip of paper, as their interest might appear, pasted on the face of the policies. Twenty-five hundred dollars in value of this subsequent insurance was, in the manner above indicated, payable to S. S. Guyer. Five thousand dollars was in the same manner made payable to S. A. Main. Twenty-five hundred dollars in the same manner made payable to George M. D. Hakes, and \$5,000 in the same manner payable to Holmes Hakes.

During all these transactions, from the execution of the trust deeds, Holmes Hakes was president of the Paper Company, George M. D. Hakes a director and stockholder, and S. S. Guyer was also a director and stockholder of the said company. George Hakes was the son of Holmes Hakes.

After the property covered by the trust deeds and the various insurance policies was destroyed by fire, Holmes Hakes assigned his interest in the policies so made payable to him to William T. Riggs, and George M. D. Hakes also assigned his interest in the policies so made payable to him to one Bentley.

On the 9th day of June, 1883, the property covered by these insurance policies and by the two trust deeds took fire and was entirely destroyed. The various insurance policies, amounting to \$35,000, were then in force.

All of these policies of insurance contained clauses providing that in case there should be other insurance effected on the buildings, then each should only be liable for its *pro rata* share of the total loss in case of fire. After the buildings and property were destroyed by fire, appraisement of the value of the buildings and property was had, resulting in fixing the total loss sustained by the Paper Company at \$21,063.54.

The amounts of the several policies were scaled down to about sixty per cent of their face value in order to raise this sum of money and make them all bear their equal proportion of the loss. The result of this scaling process was such, that out of the \$15,000 insurance held by the company for Wilson, his policies only realized him \$9,070.42.

The real estate covered by the trust deeds was sold under the power of sale and was bid in by Wilson for \$3,000. After deducting the costs of the sale (\$215) and adding the net proceeds to the amount received on the insurance policies, Wilson received less than \$12,000 on his debt, which amounted, at the time of the decree, to something over \$18,500. We have not stated the exact amount. The purpose of this bill is to subject enough of the proceeds of these various policies which were taken out after the policies for Wilson's use, to satisfy the full amount due Wilson on his two trust deeds.

There seems to be little or no controversy about the material facts.

Appellant Wilson contends that the trust deeds by their covenants created an equitable lien upon all insurance taken out by the Paper Company to an amount equal to the principal and interest of the debts secured thereby, and that where insurance was affected by the company it at once became subject to the rights of the mortgage whether the paper company so intended such insurance or not.

We think appellant Wilson is correct in his contention. It will be observed that none of these subsequent insurance pol-

icies were taken out, applied for, or paid for by the persons who now claim under them as against Wilson. None of them advanced, loaned or invested any money in or to the Paper Company in consideration of receiving this insurance or any part of it. Their claims, debts or judgments against the Paper Company (conceding them all to be *bona fide* as we do) were not incurred upon the faith or assurance that the insurance policies were to be taken out and given them for their security when they parted with their money. These various subsequent policies were all taken out and paid for by the company and assigned, as far as the company could assign them after the debts were created and in existence, and were intended as mere collateral security for prior existing debts.

But Wilson's position is wholly different. He loaned the Paper Company his money, and bought its securities upon the express condition and consideration that the company should keep him secure and safe from loss to the full amount of his principal and interest by insurance. The company binds itself to do so by the covenants in its deeds, which we have above set out.

No question arises here as to what the rights of these claimants to this fund would be, if they themselves, as creditors of the Paper Company, had taken out and paid for insurance for their own protection (in case they had any insurable interest). The Paper Company also expressly covenanted with Wilson that "it would not do or cause to be done anything whereby the value of the premises thereby conveyed should be in any manner impeached or affected and the lien hereby created, changed or incumbered."

This covenant was violated by the Paper Company when it continued to take out insurance for the benefit of its own officers and stockholders, or strangers, which, from the *pro rata* clauses in all the insurance, resulted in diminishing the value of Wilson's policies from \$15,000 to \$9,070.42. This was a palpable, legal fraud on the rights of Wilson, which neither the company, its officers, stockholders or directors had any right or power to do, and having no right themselves to do anything to diminish or destroy the value of the security, they

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could not confer any greater right on others, who were mere volunteers, by an attempted assignment of the policies, by simply directing the payment to be made to another as his interest might appear in case of loss.

The evidence in this case clearly shows that the principal value of the premises consisted of the buildings and machinery of the company, and of its insurable value, and that it was upon this value and consideration that appellant, Wilson, parted with his money and made the loan, and upon the faith that the company would keep its covenants for full insurance and keep him secure by that means, and that it would do nothing to destroy that security. To allow this company to destroy its first \$15,000 insurance made for Wilson's benefit in whole or in part by over insurance, would as effectually destroy or diminish Wilson's security as if they were permitted to make a subsequent mortgage effective to scale down the security on the first. Parties will not be allowed to do by indirection what they can not do directly.

It is earnestly insisted by counsel for appellees that the covenants to insure and to do nothing to impair the security are not covenants running with the loans, and that subsequent purchases and incumbrances in good faith and for value are not bound by record notice of these covenants. Even if this claim is true it could not be invoked in favor of the officers and directors in the company, who had actual notice of the deeds, and who ordered and directed their execution. But in the view we take of the law of this case, it is unnecessary to determine whether the covenants to insure and not to permit or suffer diminution of the security, run with the land or not.

If these policies of insurance had been or were assignable at law, so as to invest the assigns with the legal title, and had been so assigned before they became payable for value, then the question as to whether the assigns had actual or constructive notice by the record of the rights of Wilson, would become a material and important question.

But the policies of insurance were not assignable either at common law or under the statute so as to invest the assignee

with the legal title. Ill. Fire Ins. Co. v. Stanton, 57 Ill. 354. An assignee of an insurance policy can only take an equitable assignment, and he thereby gets no rights or sustains any better position than his assignor. Home Mutual Fire Ins. Co. v. Hanslien, 60 Ill. 521. The assignee takes the policy subject to the conditions it contains, and his equities confer no rights upon him as against the company or as against any other person holding a superior equity in the proceeds of the policy. The contract remains one between the original parties and the legal rights, and obligations continue at all times as between the original parties unless otherwise and mutually agreed upon by the original parties to the contract of insurance.

It follows, therefore, that George Hakes, Holmes Hakes, Stephen Main, Mitchell & Lynd, Alexander Bentley, S. S. Guyer and Wm. T. Riggs, all held whatever interest they had in the policy of insurance subject to all the legal and binding obligations which rested upon the Paper Company, either in its contract relation with the insurance company, or its mortgage obligations and covenants conveying such funds and such policies to James H. Wilson, which had been entered into before these parties received their subsequent policies. Under the clear and express covenants in these trust deeds it was the duty of the Paper Company to hold every dollar of this insurance money for the benefit of Wilson until he was paid, and thus keep the covenants it had made with him. This proposition is too plain to require any discussion. The company then had no legal or equitable right or power to divert this fund to any other purpose or person, and whoever took it, or any part of it, took it subject to the prior and first right of Wilson. Besides Wilson's clear, legal contract right to this money, his equitable right considered alone was much stronger than that of appellees. He advanced and loaned his money on the faith and credit of this insurance. Appellees were nearly all of them stockholders, officers or directors in the company, and indirectly, if not directly, had received to their own use and benefit this money, in whole, or in part, and they owed at least a moral duty to see to it that this debt was first paid out of the insurance before demanding it for themselves.

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As to Riggs and Bentley, they both received the assignments to them by the two Hakes after the fire, and there can be no pretense that they are innocent purchasers or assignees who can be protected. This assignment was a mere transfer of a chose in action, and they took them subject to all defenses of the company and to all the equities of Wilson. *Archer v. Ins. Co.*, 48 Mo. 434; *Millon v. Ins. Co.*, 17 N. Y. 609; *May on Ins.*, Sec. 386.

It is well settled that an agreement by a mortgagor to insure for the benefit of his mortgagee gives the latter an equitable lien upon the proceeds of the policy taken out by the former and embraced in the agreement, and this, too, whether the mortgagor intended the policy for his grantee or not. The law will give effect to his act whether he intends it or not. This is upon the familiar principle that equity regards that done, or will compel that to be done, which ought to be done. *Ames v. Richardson*, 29 Minn. 330; *Carter v. Rocket Ins. Co.*, 8 Paige, 437; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Millen v. Aldrich*, 31 Mich. 408.

When mortgaged property or the improvements thereon are covered by insurance and destroyed by fire, then the money represented by the insurance at once takes the place of the buildings, and represents them under the mortgage, and the money arising from the insurance should be appropriated to the mortgagee.

In *The Grange Mill Co. v. Western Assurance Co.*, 118 Ill. 396, the Supreme Court uses this language: "The principle is of frequent application where a mortgagor or vendee agrees to insure for the benefit of the mortgagee or vendor in case of loss; in equity such party is entitled to the insurance money to the extent, at least, of his interest in the property which was the subject of insurance. After notice to the insurance company having the risk, such company can not pay the loss to the assured named in the policy, except at its peril, until the rights of the parties claiming the fund have been adjusted. Cases in this State and elsewhere recognize this equitable doctrine." *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Fergus v. Wilmarth*, 117 Ill. 542; *Wheeler v. Ins. Co.*, 101 U. S. 439;

Nordyke & Marmon v. Gerry, 112 Ind. 536; Dunlap v. Avery, 89 N. Y. 592; Ried v. McCrum, 91 N. Y. 412.

From these authorities it is very clear that the rights of Wilson, the mortgagor, were prior and paramount not only to the Paper Company, but also to its assigns, and that after notice of Wilson's claim to this fund to the extent of the full payment of his mortgage, the insurance companies had no right to pay the policies to any one else, and, if they did so, it was at their peril.

The attitude and claim of these subsequent beneficiaries under these insurance policies is not different in principle from that of an attaching creditor as against prior *bona fide* purchasers for value in good faith or *bona fide* prior incumbrancers. In such cases the attaching creditor will always be postponed until the prior incumbrancer is satisfied in his legal or equitable demands. Schweizer v. Tracy, 76 Ill. 345; Am. M. U. Ex. Co. v. Willsie, 79 Ill. 92.

The mortgage carried with it the insurable value of the buildings to the extent of protecting Wilson's mortgages, if the insurable value would reach to that extent. In this case the insurable value appears to have been much larger than Wilson's debt.

Counsel for appellees insist that Wilson knew this subsequent insurance was being taken out by the company for the benefit of appellees, and that he did not object, and that he should now be estopped from claiming against them. In the first place, we find no sufficient evidence that Wilson knew that this insurance was being transferred to these parties. But conceding he knew it, he was not bound to object, at least so long as no one was placed in any worse position, or induced to part with his money, by reason of Wilson's silence, or induced to change his position for the worse. Wilson could not be estopped. He had a right to rely on the covenants of his deeds, and so long as he did no affirmative act to mislead appellees and induce them to part with their money, or to assume a worse position than they occupied before, he might keep silent and be safe. Appellees were all bound to know, as a matter of law, that they could take nothing as against

Wilson v. Hakes.

Wilson by taking these policies of insurance, and Wilson was under no moral or legal obligation to inform them that they were getting nothing, so long as they were paying nothing for these policies, except what might remain after he was paid.

On a trial below, the court decreed that Wilson was only entitled to have the proceeds of the \$15,000 insurance taken out for his own use, which, when scaled down because of the existence of the other policies to about sixty per cent, amounted to \$9,070.42, and also the proceeds of the policies which had been assigned to Holmes Hakes and by him assigned to Riggs, which when scaled down only amounted to \$2,998.32.

These two sums added to the net amount realized from the sale of the ground, which was \$2,785, made the aggregate sum of \$14,853, which Wilson received, being still due him nearly \$1,000.

The remaining policies the court directed to be paid to the several persons to whom they had been assigned.

From that part of the decree Wilson appeals, and from that part of the decree directing the interest of Holmes Hakes and William T. Riggs to be paid to Wilson, Hakes and Riggs appeal. So much of the decree as allowed any part of any of these policies to be paid to any of the assigns until Wilson's debt and interest has been fully paid, is erroneous. The decree is further erroneous in making any distinction as between Holmes Hakes and his assignee, Riggs, and the various other claimants to this fund after Wilson has been paid. So far as this record discloses there is no reason why Holmes Hakes should not occupy as favorable a position and relation to the remnant of the money after paying Wilson as any other of the claimants. The mere fact that he took out all of these policies and protected all interest as far as he could and in good faith, furnishes no reason why he should be turned away simply upon a division of the assets of the company after its debts are paid. None of these creditors seemed to have any priority in law or equity over the others. None of them as we have seen have anything but an equitable interest in this fund, and that only after Wilson is paid, and

there seems to be no superior equity in favor of any of them over Holmes Hakes. The decree is also erroneous in compelling Wilson and Riggs and Hakes to pay the costs. The decree will be reversed and the cause remanded. The court will dismiss the cross-bill at the costs of the complainants therein. The court will then ascertain the full amount due complainant, Wilson, under his trust deeds and notes, and will decree that the full face value of all the insurance policies, which were taken out and in force at the time of the fire for the use of Wilson, shall be made good to him out of the proceeds received from all the policies, or for which there is liability on the policies, and that for the balance found due him, which his own policies did not pay, then such balance shall be paid out of the remaining sum so received or to be received from the insurance companies from the various other policies which had been issued to the Paper Company and by them assigned to the various beneficiaries therein named. After Wilson has been fully paid, then the court will divide whatever remains of the proceeds realized from the insurance policies between the several claimants under the assignments, including Holmes Hakes or William T. Riggs, his assignee, in proportion to their several interests.

The court will first direct, however, that before any of the parties claiming the proceeds of the insurance shall receive any part thereof, the costs of the original bill and proceedings therein in the court below shall be paid out of that fund, and out of the remainder the divisions and application to the various parties in interest shall be made as above directed.

Reversed and remanded.

WILLIAM H. GRIMLEY

v.

JOHN DONAHUE.

Practice—Bill of Exceptions—Certificate of Evidence.

A judgment will not be reversed for insufficiency of the evidence, in the absence of a certificate in the bill of exceptions that it contains all the evidence.

Grimley v. Donahue.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

MESSRS. JOSLYN & CASEY, for appellant.

MR. C. H. DONNELLY, for appellee.

Per Curiam. This was a suit commenced before a justice of the peace, for milk claimed to have been delivered and sold to appellant by appellee. The case was tried in the justice's court, and from that court appealed to the Circuit Court, and there tried *de novo*, resulting in a verdict for appellee for \$51 and judgment rendered thereon, from which this appeal is taken.

It is insisted here that the evidence was not sufficient to support the verdict; that it was plainly shown that a portion of the milk delivered was sour and the cans dirty and unclean, by reason whereof the milk soured. We find, however, on examination of the bill of exceptions, that there is no certificate therein contained, only that it contains all the evidence heard on the trial.

The law requires that such a certificate should be made, and in case of want of it the Appellate Court will consider that there was sufficient evidence to support the verdict, all intentions being in favor of the judgment of the court below and the court's proper action. *Weaver v. Holsey*, 1 Ill. App. 558; *Board of Trustees, etc., v. Misenheimer*, 89 Ill. 151; *Henry v. Hallaway*, 78 Ill. 356.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

36 552
136 643

PEORIA & PEKIN UNION RAILWAY COMPANY

v.

UNITED STATES ROLLING STOCK COMPANY ET AL.

Appeal—Practice.

The judgment of the Circuit Court being in conformity with the ruling of this court on a former appeal, and the proof being substantially the same, it is affirmed.

[Opinion filed May 31, 1890.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. STEVENS & HORTON, for appellant.

Mr. H. W. WELLS, for appellees.

Per Curiam. This is the same case reported in 28 Ill. App. 79.

On the trial of the case below, the claim for car 3043 was not delivered. The allowance of this claim on the former trial was error, and for that alone the judgment was reversed and the cause remanded. There has been some little change in the stipulation, so as to show more clearly the relationship of appellees and the receiver of the Chicago, Pekin & Southwestern R. R. Co. in respect to the cars in question. Otherwise the proof is substantially the same as it was when the case was here before. We do not think that the change in the stipulation makes any material difference in the principle upon which the case was decided. As we said in our former opinion, we think the Supreme Court has substantially settled the law applicable to the case in favor of appellees' contention. Appellant v. C., R. I. & P. R. R. Co., 109 Ill. 136.

Having passed on the main questions here involved, when it was here on a former occasion, we do not feel at liberty to

Douglass v. Suggs.

change our ruling, since the judgment of the Circuit Court is in conformity thereto.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Judge SMITH dissents, and says he does not think the case in 109 Ill. controls this case, and that the case is materially different in its facts from what it was when it was here before.

LOUISA DOUGLASS

v.

JOSIAH D. SUGGS,¹

Practice—Bill of Exceptions—Time of Signing.

A bill of exceptions which was presented to the judge, and signed by him, after expiration of the time allowed by order of the court, will on motion be stricken from the record.

[Opinion filed June 3, 1890.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. J. A. McKENZIE and C. C. CRAIG, for plaintiff in error.

Messrs. AMMON KIDDER and BREWER & STRAWN, for defendant in error.

Per Curiam. Motion by defendant in error to strike the bill of exceptions from the record.

This motion is based on the fact as claimed that the bill of exceptions was not presented to the judge or signed by him within the time allowed by the order of the court. It appears

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that the court made an order on the 2d day of November during its session, extending the time to sign bill of exceptions for five days. On the 5th of the same month the court adjourned in course.

The bill of exceptions was not presented to the judge for signature until the 13th of the same month, several days after the time limited by the order of extension had expired. This, as uniformly held by the Supreme Court and this court, was too late, and the signing without the power of the judge. *Hake v. Strubel*, 121 Ill. 321; *Harns v. People*, 21 N. E. Rep. (S. C. Ill., June 15, '89); *Dickey v. Town of Bruce*, 21 Ill. App. R. 445.

The motion is therefore sustained and the bill of exceptions stricken from the record.

Motion sustained.

LOUISA DOUGLASS

v.

JOSIAH D. SUGGS.

Practice—Appeal—Want of Bill of Exceptions.

Where no errors are assigned except such as require an examination of the evidence as preserved in the bill of exceptions, which has been stricken from the record, the judgment will be affirmed.

[Opinion filed June 5, 1890.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

MESSRS. J. A. MCKENZIE and C. C. CRAIG, for plaintiff in error.

MESSRS. AMMON KIDDER and BREWER & STRAWN, for defendant in error.

Swan v. Burk.

Per Curiam. On motion of the defendant in error the bill of exceptions in this case was stricken from the record. There being no errors assigned, except such as required an examination of the evidence as preserved in the bill of exceptions, it follows that when the bill was stricken from the record there remains nothing to be examined by us, the presumption being in favor of the regularity of the proceedings; and for that reason the judgment will be affirmed.

Judgment affirmed.

JAMES G. SWAN

v.

JAMES H. BURK.

Foreign Judgments—Limitation.

1. An action on a foreign judgment recovered before a justice of the peace must be commenced within five years after its rendition.
2. There seems to be some doubt as to the advisability of this holding.

[Opinion filed June 5, 1890.]

APPEAL from the County Court of Iroquois County; the Hon. ALEX. L. WHITEHALL, Judge, presiding.

Messrs. A. S. DWYER and HARRIS & HOOPER, for appellant.

Messrs. HARRY BROS. and FREE P. MORRIS, for appellee.

Per Curiam. This was a suit originally commenced before a justice of the peace, based on a justice's judgment recovered by appellant against appellee in the State of Indiana, rendered more than five years prior to the commencement of this suit.

The court below held the action barred by Sec. 15 of "An Act in regard to Limitations," laws 1871-2, 556, which provides among other things that "all civil actions not otherwise pro-

vided for shall be commenced within five years next after the cause of action accrued.

This holding is justified by counsel for appellee under *Bemis v. Stanley*, 93 Ill. 230, which appears to hold that such statute barred a foreign judgment recovered in a court of record. The judgment in question is a foreign judgment and appears fairly to come within the scope of the opinion in the case cited, which we do not feel at liberty to disregard, though we are led to somewhat doubt whether the *Bemis-Stanley* case, from what is said in *Stelle v. Lovejoy*, 125 Ill. 352, will be adhered to. We also refer to *Amber v. Whipple*, Appellate Court, 1st District, rendered June 2, 1890.

In *Aarrig v. Kellogg*, 21 Ill. App. 530, this court held that a domestic judgment recovered before a justice of the peace in this State, could not, as we thought, for the reasons given in that case, which were carefully set forth, be barred by Sec. 15 of the above act, but came under Sec. 16, which barred claims where "the evidence of the debt existed in writing," only after ten years.

We thought to so hold would make our system of laws inharmonious. We understand, however, that the Appellate Courts in this State are not in harmony on the subject, and that much doubt exists; and while we will affirm the judgment of the court below, we would feel called upon to certify the case to the Supreme Court, so that the question may be fully settled, if such request is made of us.

The judgment of the court below is, therefore, affirmed.

Judgment affirmed.

LAWRENCE MORRISSEY, SHERIFF, FOR USE, ETC.,

v.

JAMES FEELEY AND MATTHEW WHITE.

Exemptions—Replevin—Bond—Evidence—Instructions—Executions.

1. It is the duty of the officer serving an execution to inform the debtor of the nature of the writ.

Morrissey v. Feeley.

2. Where there is no evidence on which to base an instruction it should be refused.

3. In an action on a replevin bond, given in replevin of goods in the hands of an officer under execution, it is *held*: That the jury were justified in finding that defendant's failure to present a schedule of his property within ten days after the executions were served, was due to misrepresentations of the officer, and did not deprive him of his right to claim his exemptions, and that there was no error in giving and refusing instructions.

[Opinion filed June 7, 1890.]

APPEAL from the Circuit Court of La Salle County; the
HON. CHARLES BLANCHARD, Judge, presiding.

Mr. CLARENCE GRIGGS, for appellant.

To one familiar with the earlier legislation and the decisions of our courts thereon the evident purpose of this statute of 1887 is to fix a time within which a debtor must present his schedule if he would preserve his rights. Under former statutes it was repeatedly held that the debtor must present his schedule "within a reasonable time." *Griffin v. Maxwell*, 23 Ill. App. 405.

What constituted "a reasonable time" depended upon the particular circumstances surrounding each case. Not until those circumstances had been reviewed by a court of appeal could a debtor ascertain whether he had presented his schedule "within a reasonable time." To cover this point expressly the statute fixed ten days. The statute of 1887 seems too plain for discussion. The court is referred to *Alden v. Yeoman*, 29 Ill. App. 53. That was replevin for chattels levied on by a constable under three executions. The executions were read to the defendant July 16, 1887. The court say: "He says the officer told him he need not make a schedule at that time. This is denied by the officer. It is immaterial. The case is governed by the act of 1887, which was then in force, which required the defendant to make his schedule 'within ten days after notice of the execution.' On the 15th of August the officer again went to the defendant and made the levy, whereupon the defendant made and ten-

dered his schedule, which, being disregarded, the present action was brought, in which there was a judgment for the plaintiff. The law was not complied with in regard to the schedule and the plaintiff had no cause of action. The schedule came too late."

It is true that exemption laws are to be liberally construed, but, as was said by the Supreme Court of Illinois in *Finlen v. Howard*, 126 Ill. 259, "We have had frequent occasion, in construing exemption statutes, to say that they should not be strictly construed. * * * In the proviso under consideration, however, it would seem there is no room for construction. It is not easy to perceive how language could be more direct and positive, clear and unambiguous than is here employed. * * * When the legislative will, in matters within its domain, is plainly and clearly expressed, we are not at liberty, because of supposed hardship, or upon considerations of policy, to wrest the words of the statute from their plain import and meaning."

According to Feeley's own testimony, an execution is read to him September 11, 1888, and twelve days thereafter he presents a schedule. To say that such schedule was presented in time is certainly "to wrest the words of the statute from their plain import and meaning."

The earlier legislation of the State required no affirmative act on the part of the debtor. The statute of 1877 gave the debtor larger exemptions, but in return for enlarged rights exacted more duties, and said if he desired to avail himself of his rights he must perform those duties, and unless he complied with the statute strictly the debtor forfeited his rights. *Griffin v. Maxwell*, *supra*; *Cook v. Bohl*, 8 Ill. App. 293; *Biggs v. McKenzie*, 16 Ill. App. 286.

Mr. JAMES J. CONWAY, for appellees.

The policy of the law has been these later years to liberally construe the exemption laws in favor of the honest debtor. I can not, therefore, agree with the theory of counsel for appellant, that no matter whether the debtor made an honest attempt to bring himself within the letter of the statute or not,

Morrissey v. Feeley.

or whether he was thoroughly informed by the constable as to the facts, yet if the constable makes the formal demand, and by some base ingenuity contrives to keep the debtor from scheduling for the space of ten days, it will thus deprive the debtor of everything of which he is possessed.

My theory of the exemption law is this: that if a constable wilfully or even through mistake, and unintentionally, misleads a debtor (not as to a matter of law, but of fact,) so that the debtor is not made aware of the fact that there is an execution in the hands of the constable to which his property is liable, then the debtor is not compelled to present his schedule to the constable until he is actually and properly informed by the constable what the writ is that he holds against him. In other words the ten days do not begin to run until the debtor has the actual knowledge of the nature of the writ.

I desire to refer the court to the following cases which were decided prior to the passage of the present statute: Blair v. Parker, 4 Ill. App. 409, and Johnston v. Willey, 21 Ill. App. 354.

According to the decisions of several of the courts it was the duty of Calkins to inform Feeley of his rights. For this proposition see the following: State v. Romer, 44 Mo. 99; State v. Barada, 57 Mo. 562; Cook v. Scott, 1 Gilman, 333; McClusky v. McNeely, 3 Gilman, 578; Smith v. Palmer, 46 Ill. 398; Thompson on Homesteads and Exemptions, 821.

Per Curiam. This was a suit brought on a replevin bond given in the suit of James Feeley against Moses Calkins, a constable, who held certain executions in favor of Mary K. Davis, against Feeley, issued from before a justice of the peace and given preliminary to the service of the writ of replevin, to the sheriff, as the statute provides. The property replevied was one span of gray horses and harness and fly net, one two-horse wagon, top box and seat, together with whiffletrees and other personal property. The replevin bond was in the usual form and provided that if James Feeley should prosecute his suit with effect and without delay and

make return of the said property, if return thereof should be awarded, and save and keep harmless the sheriff in replevying the same, then the obligation to be void, otherwise to remain in force. The declaration alleges that the Circuit Court adjudged that said Feeley should take nothing by said writ and that return was awarded, of the property, and that said James Feeley did not make return of the property, demanding \$600 as debt and same amount of damages.

The appellees pleaded that the merits of the replevin suit had not been tried, but that the plaintiff in the replevin suit had dismissed it at the October term, 1889, and averred that the goods and chattels were the property of said James Feeley and not of Calkins, and claimed that no greater damages should be assessed than one cent. On this plea a jury was called and the case heard, resulting in a verdict of \$600 debt and one cent damages for appellees, and final judgment being entered thereon by the court, this appeal is taken.

The main points urged for reversal are that the said James Feeley, when he was served with the executions, did not, within ten days thereafter, make out a schedule of his property and present the same, as the statute required, and that therefore Feeley could not claim any exemption under the statute. It appears that Feeley did, however, within twelve days after the executions were read to him, and after the expiration of ten days, and after the levy, make out the requisite schedule and deliver it to the constable, showing all the property exempt.

The excuses offered by Feeley for not making out the schedule within the ten days was, that he supposed the executions were the same under which he had recently scheduled, and that the constable fraudulently misled him as to what executions he had with him, knowing that Feeley was under a false impression, and did not inform him of his error until after the ten days had expired. There are various errors assigned on the instructions given for Feeley, and also, that the verdict was against the weight of the evidence.

The modifications of appellant's instruction No. 5 were correct. Only nominal damages could be recovered if the

Morrissey v. Feeley.

hypothesis of the fore part of the instruction was fulfilled. As to the refusal of the appellant's eighth instruction, we do not deem it error.

There was no evidence on which to base the eighth instruction.

Feeley made no pretense that he failed to schedule because he did not understand the "nature of his duties and his legal rights." His contention was that he supposed the executions were the old ones under which he had already scheduled, and the answers made on cross-examination show nothing else. The instruction offered was not based on the evidence. There are no objections to the refusal to give any other of appellant's instructions, made in his argument, and we will notice no other.

We do not think that the appellees' third instruction was erroneous, as not being based on the evidence. There was evidence tending to show that Calkins purposely misled Feeley as to the executions being the old ones. The evidence tends to show that he intended to get the advantage of him if he could and procure a sale of Feeley's exempt property. He had had instructions from a lawyer not to tell a defendant in execution of his rights, and he did not in this case, and when Feeley, as he swears, told him, "I had scheduled against that execution with Tucker," he was silent, and the jury had a right to infer from his not disabusing Feeley's mind, that he was using subtlety and cunning to entrap him, in order to get his property to apply on a debt which was not entitled to it by law. We think there was evidence on which to base the instruction. We can find no fault with appellees' instruction No. 4, as it was, evidently, Calkins' duty in some way to inform Feeley of the nature of the writ. This did not prevent the jury from finding, under appellant's instruction No. 4, that the reading it would be all that was necessary, which is all that instruction required.

We will now consider the case as to whether the verdict is so manifestly against the weight of the evidence that the judgment should be reversed for that reason. The evidence shows, to start on, that a few weeks before these executions had been

issued others had been issued on the same judgments, and Feeley had scheduled and shown thereby that his entire property was exempt from execution. It also shows that the executions in question followed close on the heels of the former ones. Why was this? There is no evidence that Feeley had acquired other property in the meantime. It must have been with the intention of harassing Feeley, or getting some legal advantage of him and getting his exempt property. The jury had a right to think that this was the purpose, and that the constable laid his plans with that view, and that Feeley was not fairly dealt with, and was induced to fail to make out his schedule within the ten days required, by artifice, and the want of a full and fair notice of what executions were held by Calkins.

The exemption laws are made for the poor and unfortunate, and should be liberally construed by the courts, and the rights of such debtors fully and freely upheld, without stint or grudging. No unfair advantage should be taken of them, and if there is not a full and fair notice given of the executions, they should be allowed additional time in which to make their schedule. This, we think, is the spirit and meaning of the law. We can not help but feel that justice has been fully done by the jury in this case, and the legal rights of Feeley upheld.

The appellant was not injured by the refusal of the court to give the propositions of fact asked to be given to the jury.

These were not controlling, and, if found in the affirmative, could have made no difference in appellant's case.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Dingler v. Strawn.

THE PEORIA COUNTY FAIR ASSOCIATION
v.
THE UNION BREWING COMPANY.

Appeal—Practice—Failure to File Briefs.

The court will reverse for failure of the appellee to file briefs.

[Opinion filed June 11, 1890.]

APPEAL from the Circuit Court of Peoria County; the Hon.
T. M. SHAW, Judge, presiding.

Mr. ISAAC J. LEVINSON, for appellant.

No appearance for appellee.

Per Curiam. This case was brought on a subscription to appellee for the benefit of the Fair.

The case is brought here by appellant, the Union Brewing Co., and it has filed briefs under the rules of this court, but the appellee has failed to file any briefs under the 26th rule of this court; therefore, under rule 27, we are authorized to and hereby reverse the said judgment, and remand the said cause under said rule.

Judgment reversed.

CHRISTIAN DINGLER ET AL.
v.
LESTER H. STRAWN ET AL.

385 563
69 185

Joint Appeal—Bond—Practice.

A joint appeal will be dismissed unless all the appellants sign the bond.

[Opinion filed June 17, 1890.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. A. R. GREENWOOD and O'CONNOR, DUNCAN & ECKELS, for appellants.

Mr. L. W. BREWER, for appellees.

Per Curiam. The appeal being prayed for jointly by Dingler, Bieas, Kuffel, Debos, Wilson, Weissenberger, Wolfer and Pogrzeba, and the appeal not having been perfected by Dingler signing the appeal bond, the appeal herein should be dismissed.

Where several parties pray a joint appeal, all must join in executing the appeal bond, or the appeal will be dismissed in this court. *Hileman v. Beale*, 115 Ill. 355. This being the case here, the motion, by appellees, to dismiss the appeal, is hereby allowed and the appeal dismissed, with leave to withdraw transcript of the record from the files.

Appeal dismissed.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY

V.

MATILDA JOHNSON.

Railroads—Personal Injuries—Evidence—Annuity Tables—Res Gestæ.

1. In an action against a railroad company for personal injuries, a statement by the plaintiff, in the presence of the conductor, soon after the injury, that he let her fall, is not admissible as part of the *res gestæ*.

2. In such action annuity tables are not admissible to show how long plaintiff is likely to live, to endure the pain resulting from the injury.

[Opinion filed June 21, 1890.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

36 564
57 194

36 564
110 1 26

C., B. & Q. R. R. Co. v. Johnson.

Messrs. O. F. PRICE and JACK & TICHENOR, for appellant.

Messrs. L. HARMON and McCULLOCH & McCULLOCH, for appellee.

Per Curiam. This is the same cause, once before this court, on appeal from a former trial, and reversed and remanded, and will be found reported in 24 Ill. App. 468. It is not necessary to restate the facts, as they will sufficiently appear by reference to the opinion in that case. The trial below, in this instance, resulted in a verdict for appellee for \$5,000. upon which judgment was rendered by the court and from which this appeal is taken, and reversal asked on several grounds. The admission, in evidence, of the statements of appellee, made just subsequent to the accident, in answer to her daughter, who asked her the question how the accident happened, is, among other things, assigned for error. Her answer, objected to, was "he (meaning the conductor), let me fall," the conductor, who stood by, making no reply. By this evidence it was attempted by appellee to fasten on the conductor an implied admission that such was the fact, the very question then in dispute, and to hold the appellee bound by it. It is insisted by counsel for appellee that the statement of appellee was a part of the *res gestæ* and admissible in evidence as such. After an examination of the authorities cited on either side, and such others as are at hand, we are of the opinion that it can not be regarded as forming a part of the *res gestæ*, but merely the relation of a past transaction. The statement made by appellee was not explanatory of an act then transpiring, but was a statement of an occurrence, as she claimed, which had happened very recently. C. W. D. R. R. Co. v. Ecker, 128 Ill. 545; Cumins v. Leighton, 9 Ill. App. 186; I. C. R. R. Co. v. Sutton, 42 Ill. 438; C. & N. W. R. R. Co. v. Howard, 6 Ill. App. 569; Cleveland, etc., v. Mara, 26 Ohio St. 135; Williamson v. C. R. R., 144 Mass. 148; People v. Davis, 56 N. Y. —; Martin v. N. Y., etc., R. R. Co., 103 N. Y. 626; V. & M. R. R. Co. v. O'Brien, 119 U. S. 99; and many other cases might be cited.

The case of *L. L. & N. A. R. R. Co. v. Beach*, 116 Ind. 566, cited by appellee, and other like cases, is not approved of in this State.

The court, therefore, erred in admitting the objectionable evidence, which must have been very damaging, it taking place so soon after the accident.

The court also erred in admitting the annuity tables in evidence, to show appellee's expectation of life. It is insisted that such evidence was proper, by way of showing the probable duration of life of appellee, in order to show how long she is likely to live, to endure the pain and suffering caused by the injury, thereby swelling the damages, it being argued that, by law, she has a right to recover for such suffering, and that it should be measured by time. We are of the opinion that such proof is not competent for such purpose. It may be competent to show, by annuity tables, the value of life interests in property or money, but we have never known them to be used in cases like this. This class of proof would be too shadowy and fictitious to be of value, and liable to mislead the jury and induce them to think that pain and suffering were fixed and certain quantities, capable of being accurately measured and estimated by duration of time, which would tend to swell verdicts in this class of cases unjustly and immoderately. Hence, such evidence is never allowed. The damages recovered, in view of the injury received, as shown by the evidence, seem to us excessive.

It is suggested by counsel for the appellee that the annuity tables were not, in fact, read to the jury, but on examination of the bill of exceptions, we find they were.

For the reason above given, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Cristman v. Cristman.

PHILANY CRISTMAN

v.

JOHN CRISTMAN.

36	567
109	484
36	567
115	247

Slander—Privileged Communications—Probable Cause—Malice—Evidence.

1. In an action for slander in charging plaintiff with commission of a crime, it is for the court to say whether the communication is privileged.
2. To entitle plaintiff to recover in such action, there must have been both malice and want of probable cause.
3. Malice is not necessarily inferable from want of probable cause.
4. Whether there was malice and want of probable cause are questions for the jury.
5. In this case it is held, that the communications were conditionally privileged, that there was probable cause, and that the words were spoken without malice.

[Opinion filed June 21, 1890.]

APPEAL from the Circuit Court of DeKalb County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. HARVEY A. JONES and COOK & UPTON, for appellant.

Messrs. DUANE J. CARNES and GILBERT H. DENTON, for appellee.

LACEY, J. This was an action on the case for defamation of character, by appellee against appellant, in which there was a verdict and judgment in favor of appellee, in the court below, of \$1,600.

The appellant is the mother of appellee, and resided on her farm. There was living with her a daughter, Irene Cristman, then a woman grown, and a man servant, John Streuchen.

In January, 1888, a short time before the alleged slanderous

words were uttered, some person or persons came to her dwelling house, in the night time, and knocked at the door, and upon Streuchen going to the door and opening it he was fired upon by the assassin, and badly wounded in the stomach, and the assassin shortly afterward fired another shot with a pistol or gun through the window, and wounded Irene in the arm. These shots were unquestionably fired with the intention of murder, and the slanderous words charged in the declaration were that appellant grossly and maliciously charged the appellee with having been the person who fired the shots. To this declaration the appellant pleaded the general issue, and filed a notice that on the trial of the case she would give in evidence and insist that after the shooting occurred, and before the speaking of the words charged, the appellee was suspected by divers persons in the county of having done the shooting, and that she had been informed by persons of facts that led her to believe, and that she did believe at the time the words were uttered, that appellee did the shooting; and that she was also led to such belief by appellee's own conduct; but appellant disclaimed any intention of showing by the evidence that appellee was guilty of the crime charged. She also intended to show that the words were spoken under justifiable circumstances, and that the uttering of the words was privileged, and free from any imputation of actual malice. It does not appear from the evidence that the person who did the shooting had any intention of robbery; but that the aim was revenge, or some other personal motive not disclosed. The appellee was a young man, some twenty-five years of age, and had lived with his mother until he became of age, and was one of the two heirs, he and his sister, to his father's estate, consisting of a large farm on which his mother resided, and that after he had become of age he had married, and refused any longer to reside with his mother on her farm, but compelled her to buy out his interest, and that she had to borrow \$3,000, and mortgage the farm to do so; that appellant was not on good terms with appellee's wife or himself, and not on visiting terms with him or his family; that some trouble had been had over appellee's grandfather's will,

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by reason of which and the action of appellant, appellee had been cut off from a legacy of \$500; that appellee had spent all his \$3,000 received from his interest in the farm; that at the time of the shooting Streuchen claimed to recognize appellee as the person who shot him, and also persons who compared the tracks of the assassin, made when fleeing from the house on the night of the shooting, stated that they resembled appellee's; that just after the shooting, the whole neighborhood was of the opinion that appellee did it, and those rumors did not entirely emanate from appellant; and besides, appellant had no known enemies. There are a number of other circumstances tending to cast a strong suspicion upon appellee and induce belief of his guilt, not necessary to mention.

It was a very strange occurrence, and certainly the evidence and circumstances reasonably tended to induce appellant to believe that her son was the guilty party, though we must presume that he was entirely innocent, as no attempt has been made to show his guilt or the truth of the charge. Had the appellant immediately sworn out a warrant against her son charging him with the crime, and he had been tried and acquitted of the offense, and this suit had been for malicious prosecution, the evidence would have been strong tending to show that appellant had reasonable cause to institute the criminal action.

The position of the appellant in this action is very much the same as though this were an action for malicious prosecution under the supposed circumstances above named, provided appellant, in saying what she did, was in pursuit of light to enable the case to be successfully prosecuted against appellee, and made to persons that in some way might aid her, or made to appellee himself. It is all governed by the same rule of law that denominates such acts of parties, privileged, and the supposed offender not liable in an action for slander or malicious prosecution, unless actual malice, distinguished from malice at law, is proven, and this is a question for the jury.

In *Briggs v. Garrett*, 111 Pa. 404, 2 At. Rep. 521, the court say: "An action for libel is upon all fours with an action

for a malicious prosecution. The latter is but an aggravated form of an action for libel, as in it a libel is sworn to before a magistrate. The cases make no distinction between them." We may add here, an action for verbal slander also rests on the same principle of law, the one being written and the other verbal. As there is a contention between counsel for the respective parties, whether the court or jury is to determine when the occasion is privileged, when there is probable cause and where there is malice, active or constructive, we will refer to the principles established by our Supreme Court in cases for malicious prosecution, as being analogous and much more satisfactory than any decisions of any court of any other State or country.

We deduce from the cases decided in this State that, first, the court is the judge of the occasion when and where the communication is privileged; second, that it is a question for the jury to determine, after the court instructs what circumstances will constitute probable cause, the question as to the sufficiency of the proof of the facts; third, when there is not probable cause, it is for the jury to determine whether there was malice in fact, if indeed the jury should not always find there was malice in fact where there is want of probable cause, a question which, from the adjudged Illinois cases, we are not quite able satisfactorily to determine. However, it is said in *Jacks v. Stimpson*, 13 Ill. 701, "That inference of malice arising from want of probable cause may be rebutted, is not denied; but it is not necessarily overcome, as the instruction would imply, by simply showing, if such a thing be possible, that the defendant believed there was probable cause, when all the facts and circumstances under which he acted clearly show there was none; that his belief was utterly groundless, and could never have been formed without the grossest ignorance or negligence." As was said by Lord Ellenborough in *Brooks v. Warwick*, (2 Starkie, 390), "a commitment may be pressed under circumstances showing such a *crassa ignorantia* as amount to malice."

Then it is stated in the same opinion and authorities cited, that "the mere belief of the prosecutor is no defense."

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In *Harpham et al. v. Whitney*, 77 Ill. 32, it is said: "There must be both want of probable cause and malice; if the law imputed malice from want of probable cause, then there would be no distinct requirement of malice; but want of probable cause would be the sole element necessary. It is often said that the jury may infer malice from the want of probable cause. They may do so under certain circumstances, but not in all cases. Malice is in no case a legal presumption from want of probable cause, it being for the jury to find from the facts proved that there was no probable cause. 1 Hilliard on Torts, 486. And if the defendant can not justify by proof of probable cause, he may still rebut the presumption of malice by showing facts and circumstances calculated to produce at the time on the mind of a prudent man a well grounded belief or suspicion of the party's guilt." *Ibid.* 515.

But would not the proof last suggested make out a case of probable cause, and if not, would we not be without any appreciable example where want of malice may be shown not to exist, where there is want of probable cause? Probably the question is not a very practicable one, as we suppose malice in most cases, though it must be found by the jury, would necessarily follow from proof of want of probable cause. Another rule we deduce from the Illinois cases is, that where there is proof of probable cause to institute the prosecution, then no recovery against such an one can be had, no difference how much malice may be shown.

It being a privileged matter for any person to cause legal measures to be instituted for the punishment of crimes, the parties so commencing it can not be held liable in case of malicious prosecution, unless there is malice and want of probable cause concurring. The policy of the law is to favor prosecution for crime and it will afford such protection to the citizen who prosecutes as is essential to public justice. *Richey v. McBean*, 17 Ill. 63. To justify prosecution there must be honest belief and strong ground of suspicion of the guilt of the accused, and reasonable grounds for such belief or suspicion, etc.

The following cases will be found to cover the points above

suggested: *Jacks v. Stimpson*, 13 Ill. 701; *Anderson v. Friend*, 71 Ill. 475; *Angelo v. Faul*, 85 Ill. 106. Want of probable cause can not be inferred from malice. *Wade v. Walden*, 23 Ill. 425; *McBean v. Ritchie*, 18 Ill. 114; *Mitchinson v. Cross*, 58 Ill. 366; *Thompson v. Force*, 65 Ill. 370; *Montross v. Bradsby*, 68 Ill. 185; *Krug v. Ward*, 77 Ill. 603; *Hirsh v. Feeney*, 83 Ill. 548; *McDavid v. Blevins*, 85 Ill. 238.

If the case under consideration had been one for malicious prosecution we think, under the circumstances, there was reasonable proof of probable cause. This being so, and the rule of law analogous and applicable to the case at bar, we think that the communication is privileged if made in good faith, in the prosecution of an inquiry regarding a crime that has been committed, and for the purposes of detecting and punishing the criminal. *Carnes v. Whitaker*, 123 Mass. 342. The slanderous words in the above case were spoken to a mere neighbor, whom the defendant had called on to consult concerning the plaintiff.

The purpose of the defendant in that case was to see if his neighbor could aid him in detecting the thief. This was held to be privileged.

A party interested in a crime, one who loses goods by theft, may charge the supposed thief with the larceny, even in the presence of others, even those not officers of the law, and claim the privilege, the jury being left to judge whether the charge was made in good faith or not. *Billings v. Fairbanks*, 136 Mass. 177.

One may charge another with crime by informing another and seeking his advice by way of investigating the falsity or truth of the charge, even in the presence of third persons, and still claim the privilege. *Gurnes v. Coyle*, C. B. Monroe, 304; *Townsend on Slander and Libel*, Sec. 209; *Odger on Slander and Libel*, Sec. 219 (2d Ed.), 157; *Toogood v. Spyring*, 1 Cr. M. & R., and 4 Lynn, 582. This last case seems to have been a pioneer in announcing the doctrine and is quoted in almost all subsequent cases on the same subject. Baron Parke says: "I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to

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some person interested in the inquiry alone, and not in presence of third persons. If made with honesty of purpose to a party who has an interest in the inquiry (and that has been very liberally construed), the simple fact that there has been some casual bystander can not alter the nature of the transaction."

The appellee's counsel quotes the following passage from Townsend on Slander and Libel (Townsend on Slander and Libel, 2d Ed., Sec. 288), viz.: "If the court decides the publication is conditionally privileged, then it is a matter of law for the court to determine whether there is any intrinsic or extrinsic evidence of malice," and insist that to be the law here.

We do not think that the above extract is in accordance with the law in this State, as declared by the opinions of the Supreme Court. Malice in actions of this nature, when not implied as a matter of law, is a question for the jury, and contains no such exception as the above suggests.

The law in this State is, that the court determines the question as to whether the occasion is one of privilege, and the question of whether the communication was made in good faith to forward legal investigation, or to discover the guilty party, or other justifiable purposes, or whether it be made use of to vent malice, is a question for the jury.

The only two occasions where it is claimed the slanderous words were spoken are as follows: First, when constable Emery Wilmarth was present some three or four weeks after the shooting, where was also present Lewis M. Gross. In this conversation appellant said to Gross in reply to what he had said that it was pretty rough to be shot down in one's own house; that is, "it seems a great deal worse being done by one's own family;" after that, as Gross swears, "There was some talk about a detective that was sent out here, and I don't remember just exactly the conversation, but he was the subject of the conversation; we all seemed to think that was evidence bearing on the case, and she said that had been her opinion from the first, and she further stated that, 'If it is Johnnie, I want to see him punished.'" It must be borne in

mind that Wilmarth, who was a constable, had been at the scene of the shooting within an hour after it took place, for the purpose of finding out who was the criminal, and appellant at that time made, in substance, the same statement that she did in the presence of Gross.

According to the evidence of Wilmarth he was there both times "for the purpose of finding out the person who committed the crime if I could; as such officer (constable) made inquiries of appellant whether she had any knowledge; that is what I tried to find out." On the second trip he took Gross, who was a school teacher, down with him. It seems that Gross, too, was playing the detective and questioning the appellant and discussing the case.

The second occasion where the alleged slanderous words were spoken was the third day after the shooting took place; she then, in appellee's presence and King's, who went with appellee to his mother's house, charged him with the crime. Her words were, there, as stated by appellee on the witness stand, "There is only two mean enough to do it, and Johnnie is one of them;" and then said, "Johnnie is the only one that would do it, and he is the one that did do it." Appellee took King with him and the statement was made in response to the question that King asked her; it was this: "Had she any idea who did it, or something of the kind;" in answer she made the response in question.

These are the words relied on for recovery. We do not think that on either occasion, according to the rules of law above laid down, the circumstances in either case were such as to deprive the appellant of the right to invoke the rules of law applicable to privileged communications. The first, it seems to us, was clearly within the rule, and the last, while probably not quite so clearly so, yet fairly within it, as announced in *Toogood v. Spyring*, *supra*, and other cases cited.

The appellee's counsel quotes some passages from adjudged cases and text books that may seem to be somewhat in conflict with the law in the cases above cited, but when properly understood with reference to the subject-matter of the cases

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decided, are not materially so. We think that in accordance with the spirit of the law which encourages the detection and punishment of crime, and where its execution almost entirely depends upon some private person, as is the case in this country, to institute inquiry and prosecution, the rule of law should be liberally construed to protect one, and especially an interested person who is honestly endeavoring to right his own wrong or to execute the law.

And such we understand to be the spirit of the decisions of our Supreme Court.

It follows that the sixth instruction given for appellee, which tells the jury if they "believe from the evidence that any one or more sets of the slanderous words alleged in the declaration had been proved to have been spoken by the defendant as therein charged, and that the defendant thereby intended to impute to the plaintiff the crimes mentioned in the declaration, then and in that case, the law conclusively implies malice and you should find for the plaintiff, even though you should further believe from the evidence that the defendant at the time of the speaking of the slanderous words, believed them to be true."

This instruction cuts off the entire defense. It is a construction by the court that the occasion of the uttering of the words was not such as to make them in any way privileged, because that question is entirely ignored by the instruction; and the question of express malice is taken from the jury and they are ordered to conclusively presume malice from the speaking of the words.

We need not consider the appellant's refused instructions as those given by the court on the part of the appellee, together with the insufficiency of the evidence, are cause for reversal. Finding that the words charged to be slanderous were spoken under circumstances which rendered them conditionally privileged and where there was probable cause, and that they were uttered by appellant without malice, and also finding that no recovery can rightfully be had under the evidence in the case, the judgment of the court below is reversed without any remanding order.

Judgment reversed.

JOHN T. WILSON ET AL.

v.

V. I. AARON, ASSIGNEE.

Insolvency—Voluntary Assignment—Continued Custody of Property by Assignor at Assignee's Request—Attachment—Jurisdiction of County Court.

1. The County Court has full and exclusive jurisdiction of insolvent estates under deeds of assignment made in conformity with the statute, and before any other jurisdiction has attached, except in special cases, when courts of equity may interfere to promote the ends of justice.

2. Upon an order of the trial court affirming an order of the County Court directing that certain property attached be returned to the assignee under a voluntary assignment, this court holds that the County Court had jurisdiction of the same, and that relief should have been claimed, and the validity of the assignment questioned in that court alone.

3. Property described in the inventory under a deed of assignment, left with the assignor, under an arrangement with the assignee that he shall be compensated for care of the same up to the time of sale, is within the jurisdiction of the County Court.

[Opinion filed May 25, 1889.]

APPEAL from the Circuit Court of Livingston County; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. STRAWN & PATTON, for appellants.

“The settled, general rule in American law is, that a provision in an assignment by which any benefit or advantage is reserved to the debtor, at the expense of the creditors, whether such benefit be temporary or permanent, and whether reserved to the debtor himself, or for the benefit of his family, is a fraud in law and vitiates and avoids the whole assignment.” Burrill on Assignments, 2d Ed., p. 179; McLurg v. Lecky, 3 Penrose & Watts (or Penn. R.) 83, 91, 92; Mackie v. Cairns, 5 Cowen, 547; Harris v. Sumner, 2 Pickering, 129; Goodrich v. Downs, 6 Hill (N. Y.), 438, 439; Gazam v. Poyntz, 4 Ala. 374; Stokes v. Jones, 18 Ala. 734, 737; Byrd

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v. Bradley, 2 B. Monroe, 239; Henderson v. Downing, 54 Miss (2 Cushman), 106; Green v. Trieber, 3 Maryland, 11; Hardin v. Osborne, 60 Ill. 93; Steere v. Hoagland, 39 Ill. 264; Jones v. King, 86 Ill. 229; Young v. Hemans, 66 N. Y. 382; Sugg v. Tillman, 2 Swan, 208.

Second. The deed of assignment gave to the assignee the power to appropriate a portion of the proceeds of the estate toward the payment of attorneys' fees. The conveyance of such power to the assignee makes the deed fraudulent as against creditors. Heacock et al. v. Durand et al., 42 Ill. 230.

The possession of the property was left with assignor and he used it for his own profit and convenience. The assignee never had possession of it for a single moment prior to its return by the sheriff under the order of the County Court. The retention and use of the property by the assignor made the assignment fraudulent. Dawes v. Cope, 4 Binney, 258; Hower v. Gusman, 17 Serg. & Rawle, 251; Young v. McLure, 2 Watts & Serg. 147, 150; Hall v. Parsons, 17 Vt. (2 Washburn) 271; Thornton v. Davenport, 1 Scam. 296; Rhines v. Phelps, 3 Gilm. 455; 1 Smith's Leading Cases (Hare & Wallace' notes), 55.

The law, in such a case, raises the conclusion of fraud, incapable of being rebutted or explained. Anderson v. Fuller, 1 McMullan's Equity, 27; Smith v. Henry, 1 Hill, 22; Meeker v. Wilson, 1 Gallison, 419.

That permitting the assignor to retain the possession of the property is *prima facie* evidence of fraud, is the established rule in Massachusetts, Connecticut, New York, North Carolina, Indiana, Arkansas, Maine, New Hampshire, New Jersey, Missouri, Kentucky, Tennessee, Virginia, Georgia, Alabama and Texas.

The County Court was the proper place to question the validity of the assignment. Farwell v. Crandall, 120 Ill. 70.

The assignee, not having taken possession of the property up to the time the sheriff levied on it by virtue of the executions aforesaid, and the property being in the possession and use of the assignor, the County Court had no jurisdiction over the property. The making, delivery and recording of

the deed in the county clerk's office did not give the County Court jurisdiction and control over the property. This question was raised and settled by the Supreme Court in *Preston et al. v. Spaulding*, 120 Ill. 208; see pp. 231 and 232 of the opinion.

On the trial below, counsel for appellee cited and relied on *Freydendall v. Baldwin*, 103 Ill. 325, and *Hanchett v. Waterbury*, 115 Ill. 220, as did counsel for appellee in *Preston et al. v. Spaulding et al.*, yet the court in the latter case points out the difference between the cases to be, that in the two earlier cases the assignee was in possession of the property, while in the latter case the assignee had never taken possession of the property. It occurs to us the Supreme Court decided very clearly that the delivery and recording of a deed of assignment for the benefit of creditors, and the acceptance of the trust by the assignee, and the filing of his bond and inventory, does not give the County Court jurisdiction over the property.

Messrs. *McILDRUFF & TORRANCE*, for appellee.

If a fraud had been attempted Goembel could have gone into the County Court, which had full authority under the "Insolvent Debtor's Act" to hear and adjudicate upon all conflicting rights, and there had his rights determined. *Freydendall et al. v. Baldwin et al.*, 103 Ill. 325.

If the assignee was not properly performing his duty, upon complaint the County Court had full power to direct and control him. *Freydendall et al. v. Baldwin et al.*, 103 Ill. 325; *Hanchett v. Waterbury*, 115 Ill. 220; *Farwell et al. v. Crandall*, 120 Ill. 70.

That the appellants could not seize upon and sell the property upon executions issued from the Circuit Court after the making, filing and recording of the deed of assignment in County Court is well settled in *Hanchett v. Waterbury*, 115 Ill. 220, a case well and carefully considered and re-affirmed in *Farwell et al. v. Crandall*, 120 Ill. 70.

As is well said in *Hanchett v. Waterbury*, "To permit such interference would practically defeat the chief object of the statute, namely, to provide a convenient, expeditious and

inexpensive tribunal, through the instrumentality of which an insolvent debtor may make an entirely equitable distribution of his effects among his creditors. If, after the jurisdiction of the County Court has attached, third parties having real or pretended claims to or upon the trust estate were permitted by means of process issued out of other courts, to take possession of the property in the hands of the assignee, for purposes of litigation in such other courts, the County Court by this means might be deprived of its jurisdiction altogether. In any event, it would necessarily so retard and embarrass the proceedings in the County Court that it would be impossible to administer the estate in the manner or within the time prescribed by the act, and to that extent would render the statute imperative. A construction leading to such a result ought not to be adopted. To give the statute practical effect in all its provisions, we feel constrained to hold, as we do, that upon the making, filing and recording of the assignment, with the lists and schedules annexed, the County Court, wherein such assignment is filed and recorded, in its character as an insolvent debtor's court, by operation of law at once acquires jurisdiction over and becomes possessed of all the property and estate embraced within the assignment, subject, of course, to all prior liens and just claims that third parties may have to or upon it. * * * The assignee, the insolvent debtor, and all persons claiming an interest in or upon the fund, are subject alike to the summary jurisdiction of the court, and whatever rights, real or supposed, with respect to the fund, must primarily be litigated therein; and that there may be no failure of justice, the act, as we have already seen, clothes the court with power, when in its judgment the exigencies of the case require it, to order a trial by jury. While the legal title to the fund is in the assignee, the possession of it, as we have just seen, is in the court, and the assignee's relation to the court is analogous, in some respects, to that of a receiver, or an assignee in bankruptcy."

Counsel for appellant are mistaken when they assert *Preston et al. v. Spaulding et al.*, 120 Ill. 208, asserts a different rule. There the property which the court ordered distributed

through its receiver was property that was in possession of a sheriff and a United States marshal before the assignment, and which the assignee was not seeking to reach, and the equities in the bill were of such a nature as an insolvent court could not consider, the assets that were the subject of contention not having been brought within the jurisdiction of the County Court. That case especially re-affirms the position of the court in *Hanchett v. Waterbury*, and *Farwell et al. v. Crandall et al.*, *supra*.

C. B. SMITH, J. This is an appeal from an order of the Circuit Court of Livingston County. The facts out of which this controversy arises are about as follows: On February 21, 1888, Sylvanus Mitchell, then being in failing circumstances and unable to pay his debts, made by deed a voluntary assignment to V. I. Aaron for the benefit of all his creditors, under the statute relating to that subject. On the 22d day of February the deed was filed for record in the county clerk's office, and on the same day the deed was recorded. Aaron, the assignee, went out to Mitchell's place, about two miles from town, and looked over the property, and made an inventory of it in addition to the inventory attached to the deed of assignment, and on the same day filed his inventory with the county clerk. The assignee also made an arrangement with Mitchell to keep the property for him on the place until it was sold, telling him he should be paid for it, and the property was accordingly left with Mitchell, under that arrangement, until it was levied on by the sheriff. On the 24th day of February the assignee filed his bond with the County Court in the county clerk's office. The assignee then advertised the property for sale on March 8th, and circulated the bills, and put one in the office of William P. Goemble. Prior to February 22, 1888, Sylvanus Mitchell and William P. Goemble were indebted to J. E. Brown & Company on two judgment notes, one for \$675.67, and the other for \$555, in both of which notes Goemble was security for Mitchell. On the 22d day of February, 1888, the same day the deed of assignment was recorded, J. E. Brown & Co. had judgment confessed on the first of the above do-

scribed notes against Mitchell and Goemble for the amount therein named, and on the 24th day of February, 1888, they had judgment confessed against Mitchell and Goemble for the amount of the second note. Nothing was done under either of these judgments until the 5th day of March, 1888, when, at the request of Goemble, Brown & Co. had executions issued and placed in the hands of the sheriff to execute. Goemble went with the sheriff to Mitchell's place, and finding the property described in the deeds of assignment all still in Mitchell's possession, directed the sheriff to levy on it, and take it into his possession, which the sheriff did, and removed the property out of Mitchell's possession by virtue of his execution. On the 8th day of March following, the assignee filed a petition in the County Court, asking for an order on the sheriff to return the property to the assignee, and asking that Goemble and the sheriff might be punished for contempt. Appellants answered the petition, setting up their claim and right to the property, alleging that the assignment was fraudulent and void, and that the assignee had never taken any possession of the property.

On the trial the County Court found in favor of the petitioner, and ordered a return of the property to the assignee, and directed the assignee to sell the property and hold the proceeds to abide the result of this litigation. On appeal to the Circuit Court the order of the County Court was affirmed. Appellants now bring the record here for review and ask for a reversal of the order of the Circuit Court. In the view we take of the case it is only necessary for us to consider whether the County Court had jurisdiction of the property (it being conceded it had jurisdiction of the person). There is no controversy about the jurisdictional facts as we have stated them. Upon other branches of the case involving the question of fraud there is a dispute, and upon that branch of the case we express no opinion, as that question must be tried and determined in the County Court if at all. Did the undisputed facts confer jurisdiction of the property on the County Court? This question must be answered in the affirmative. We are justified in assuming that the deed of assignment, its acknowl-

edgment, and the inventory thereto attached, were all in due form and in compliance with the statute, since no question is made against the form of the procedure, except the reservation of the debtor's exemptions in the schedule with the prices thereto attached.

We think the questions raised in this record must be regarded as settled against the appellants and not open to further discussion. If repeated decisions of the Supreme Court upon the same question upon full consideration can settle anything, then the full, complete and exclusive jurisdiction of the County Court over "insolvent estates," under deeds of assignment, made in conformity to our statute and before any other jurisdiction has attached, must be regarded as settled.

The following cases are all clear and explicit upon the question of exclusive jurisdiction of the County Court after the deed of assignment and inventory has been properly executed and filed, and before any other court has obtained jurisdiction of the property. That very act, *ipso facto*, transfers the *possession* and *control* of all the estate of the debtor into the control and jurisdiction of the County Court. Freydendall v. Baldwin, 103 Ill. 325; Hanchett v. Waterbury, 115 Ill. 220; Field v. Ridgley, 116 Ill. 424; Farwell v. Crandall, 120 Ill. 70.

The County Court, then, having complete jurisdiction of both the parties, creditors as well as debtors, and of all the estate (as well what was included in the schedule, as what might be thereafter discovered), it was the duty of appellant Goemble to have gone before the County Court, and there asked for whatever relief of priority or otherwise he might deem himself entitled to, or he might contest the validity of the assignment, and show it to be fraudulent and void, if he could.

While we concede the original and exclusive jurisdiction of the County Court in all matters of insolvent estates when they first obtain jurisdiction under proper deeds of assignment, we at the same time hold that there may be special cases where a court of equity would and ought to interfere under its general powers for the promotion of justice. It is

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not safe ever to lay down any positive rule that would exclude a court of equity from exercising jurisdiction where such jurisdiction and intervention might become necessary to promote the ends of justice or to prevent wrong or hardship. And so we understand the cases to which we have referred, to hold.

Finding no error in this record the judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLIAM P. BOYD

v.

GEORGE W. ERNST.

Sales—Account—Running, or Separate and Distinct—Limitations—Subsequent Promises—Homestead Exemption—Special Verdict—Evidence.

In an action brought to recover an amount alleged to be due for material furnished, this court holds that the indebtedness in question consisted of a running, and not two separate accounts; that the jury were justified in finding a subsequent promise to pay amount claimed; that the amount of the verdict, less the remittitur, was sustained by the evidence, but that it was error to allow the special verdict to stand as against the debtor's homestead for the entire amount, likewise to make the same a lien upon certain real estate, upon which the judgment finds said homestead was situate.

[Opinion filed May 25, 1889.]

APPEAL, from the Circuit Court of Kendall County; the Hon. C. W. UPTON, Judge, presiding.

Mr. A. C. LITTLE, for appellant.

Messrs. R. P. GOODWIN and J. STEWART WILSON, for appellee.

LACEY, P. J. This suit was in assumpsit brought on an account by appellee against appellant, and resulted in a verdict and judgment in favor of appellee for \$730.67. The special

verdict of the jury was for \$909.35, and that \$800 of this amount was for lumber used for the improvement of appellant's homestead.

The appellant insists that the verdict of the jury was not sustained by the evidence, either as to the main verdict for the amount due, or as to the amount used for the improvement of his homestead. The main objection of the appellant is, that a large portion of the account in question, notably that prior to November 23, 1882, amounting to the sum of \$618.05, was barred by the statute of limitations of five years. It appears that the account sued on was mostly for lumber and materials furnished appellant by appellee, the latter being a lumber dealer, and that the account commenced to run November 23, 1870, and ceased November 6, 1884, a period of about fourteen years. The suit was commenced in April, 1888. It appears that there was a balance due on the account of \$618.05 November 23, 1882, and that the appellee made out a statement of his account and sent it to appellant; that it was not paid, and that no new item was gotten by the latter till May 1, 1883, and from that time to November 6, 1884, the appellee's account amounts to \$253.19. The appellant insists that the claim of appellee, for that reason, was divided into two separate accounts, the last one commencing at the date of the first charge subsequently to the statement, and the other accruing prior to that time, and the account to November 23, 1882, is barred by the statute of limitations. To this plea a subsequent promise is replied by appellee.

It was a question of fact for the jury to determine, whether or not there were any credits given by appellant's consent on the account, and to what portion of the account the credit applied, and also whether appellant promised appellee to pay him the account, and to what portion of such account, if such promise was made, it applied. The appellee testified that within five years of the commencement of the suit, he gave appellant credit for a load of oats and some pasturage for his cattle, furnished by the latter, amounting to \$65; also that within five years the appellant promised to pay him his account generally. It is true that appellant claims that appellee had no authority from him for crediting the account, not

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even the new one, with the oats and pasturage, but appellant swears that they were to be credited, especially the pasturage. We think the claim of appellant, that the appellee's claim was divided into two distinct and independent accounts is hardly tenable. It is more artificial and fanciful than real. The account was always kept in the same book and followed along in consecutive order, and there is nothing to work any division except that the account was stated November 23, 1882. No note was given, nor was any payment made, and we see no reason why the items furnished after the statement and added to it might not be regarded with the former items as a running account. And whether the promise to pay as testified to by appellee referred to the entire account, or only that accruing subsequently to November 23, 1882, was a question for the jury to determine; as well as whether any promise to pay was made within the five years; also to what portion of the entire claim of appellee the credits applied. We think there was evidence sufficient to sustain the verdict of the jury in appellee's favor on the issue of a subsequent promise; we also think, after the remittitur, the evidence sustained the verdict of the jury.

But the jury found a special verdict in addition to the general one of the amount due, of \$909.35, that \$800 of the verdict was "expended on improvements on homestead of defendant." The court below ordered a remittitur of \$178.68, which was acceded to by the appellee, and that amount was remitted, reducing the general verdict to \$730.67, and judgment was rendered for that amount. The remittitur of so much on the amount of the verdict generally, renders it uncertain how much of the remainder was used in the improvement of the homestead. If the entire remittitur is taken from the \$800, instead of the \$909.35, there would only be \$621.32 against which the homestead could not be set up according to the verdict. If it be taken from the \$800, and the balance of the verdict in proportion to the amount of the remittitur, then the amount found to be used on the homestead (the entire judgment) would still be too large. The court erred in allowing the verdict to stand as against the homestead for the entire amount.

Again, the language of the statute is that the homestead exemption can not be set up as against "a debt or liability incurred for the purchase or improvement thereof." This verdict is not in the language of the statute, nor does it contain the substance of it. It only finds that such an amount was "expended on improvements of the homestead of defendant." It is matter of serious doubt, whether, when the materials are furnished, it must not be with the understanding that they were to be used to improve the homestead, the same as is required in the mechanic's lien law. For all that the verdict finds, the materials may have been furnished for an entirely different purpose than for the supposed improvements, but finally diverted and used to improve the homestead. Another objection to that part of the verdict and judgment, is, there was no evidence as to where the homestead was situate, but the judgment finds it was situate on certain specific real estate, and declares a lien for the whole amount of the judgment on that particular real estate. This was error. The statute gives no lien; it only excepts the operation of the statute as to the exemption in such case. The judgment should be no different than ordinary judgments, other than the finding in accordance with the verdict of the jury.

The appellee requests the court to correct the judgment in this court in respect to any error committed in regard to the special verdict and judgment touching the homestead. As we think it will better promote justice to do so, we will make the correction. The special verdict in regard to \$800 of the material having been used in the improvement of the homestead of appellant is therefore set aside, and the judgment declaring a special lien on appellant's real estate is also set aside, and reversed, but in all other respects the judgment of the court below is affirmed, and it is ordered that appellee pay the costs of this appeal.

Judgment in part reversed and in part affirmed.

Judge Upton, having tried the case in the court below, took no part in the decision here.

Carr v. Trainor.

DANIEL CARR
v.
THOMAS TRAINOR ET AL.

Injunctions—Annulment of Judgment after Rendition—Execution—Justice—Mistake of Law.

1. A justice of the peace can not annul a judgment after its rendition by him.
2. Equity will not relieve on account of mistakes at law, where the facts are, or by the exercise of due diligence might have been known.
3. Ignorance of law will not excuse any person either for a breach or omission of duty.

[Opinion filed May 25, 1889.]

APPEAL from the Circuit Court of La Salle County; the Hon. GEORGE W. STIPP, Judge, presiding.

MESSRS. DUNCAN, O'CONOR & GILBERT, for appellant.

MESSRS. SAMUEL RICHOLSON and WILLIAM L. SEELEY, for appellees.

LACKY, P. J. Appellant commenced his bill in equity in the Circuit Court, which alleges that appellee Thomas Trainor commenced suit before A. A. Fisher, a justice of the peace, against appellant, on December 4, 1886, returnable December 15, 1886; that on the morning of December 15th appellant came to Ottawa to defend said suit, and was informed by said Fisher that the same had been dismissed. It further alleges that twenty days after said December 15th appellant heard it rumored that a judgment had been obtained against him in said suit, and that he, on the following day, called on said Fisher to ascertain if said rumors had any foundation; that said Fisher informed appellant that he had made a mistake and had confounded two suits, and had misinformed appellant on the 15th of December, and that in consequence

of said mistake he would annul the judgment; that Fisher then and there entered upon his docket, under the said judgment, the following: "Above suit dismissed without costs, there having been a mistake in the parties by the court." It further alleges that subsequent to the last visit of appellant to Fisher, Fisher wrote him a letter, saying that said judgment was entered by mistake, and that the same had by him been set aside.

That appellant did not read the docket of said Fisher, nor did he know the contents of the record in said case, and the contents of the said record came to appellant within ten days of the filing of this bill; that relying on the statements of said Fisher, appellant paid no further attention to said suit, supposing it was dismissed; that Fisher, during his life, did not issue any execution on said judgment; that he died in the year 1887; that his docket passed into the hands of C. E. Tryon, who, on December 1, 1887, issued an execution thereon, directed to appellee Curtis as constable, who levied upon two mares belonging to appellant, and now has possession thereof, and threatens to sell the same; that appellant was not at the time of the commencement of said suit, nor is he now indebted to said Trainor in any sum; that said Trainor had no cause of action against appellant; that but for the mistake of said Fisher, he would have appeared before said Fisher on said 15th day of December, 1886, and made full defense to said suit.

Upon motion of appellees the injunction was dissolved and the bill was dismissed at appellant's costs, from which decree this appeal is taken, and the dissolving of said injunction and the dismissal of the said bill is assigned for error.

In the first place, the appellant was informed that the suit against him was dismissed, and for this reason he made no defense to the action. In this information imparted to him by the justice, the latter was mistaken, for he had rendered judgment against appellant.

The appellant in about twenty days discovered the mistake, but instead of taking an appeal in the regular way, or by *certiorari* if the twenty days allowed by law for appeals had

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elapsed before he ascertained the fact that the justice had so rendered the judgment, he took the advice of the justice, impliedly that the justice, notwithstanding the judgment had been rendered against him on the 15th December, he—the justice—could lawfully annul it, and this the justice did actually attempt to do. The justice had no legal right to annul the judgment after having rendered it, and this the appellant knew or might have known as well as the justice. The justice, it appears, was as honestly mistaken in the law regarding his powers as the appellant. It is a well settled rule of law in this country that equity will not relieve on account of mistakes at law where the facts are known or by due diligence might have been known. In *Hinrichsen v. Van Winkle et al.*, 27 Ill. 337, the court say that “a party can not ask for relief in equity on the ground that he has failed or omitted to make a legal defense at law, and this rule is absolutely inflexible and can not be violated, even when the judgment in question is manifestly wrong in law and in fact, or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe or which he owes to a third party, unless it shall appear that it was obtained by fraud or was the result of accident or mistake.” See to the same effect, *Sanger et al. v. Fincher*, Adm’r, 27 Ill. 346; *Abrams v. Camp*, 3 Scam. 291; *Bank v. Stanton*, 2 Gilm. 352; *Moore et al. v. Bagley et al.*, Breese, 94.

“It is a well known maxim that ignorance of law will not furnish an excuse for any person either for a breach or omission of duty.” *Story’s Equity Jur.*, Sec. 111, 137, 138.

There being no grounds for equity relief in this case the decree of the Circuit Court is affirmed.

Decree affirmed.

ROCK ISLAND & PEORIA RAILWAY COMPANY

v.

JOHN POTTER.

Railroads—Negligence—Delay in Transferring Stock—Telephone Message—Presumption as to Party Replying—Damages—Evidence.

1. The failure of a railroad company to immediately transfer stock to a connecting line, or to notify the consignees or the agents of the connecting line for three hours after the arrival thereof, notwithstanding repeated inquiries therefor, constitutes gross negligence.

2. In an action brought to recover damages suffered through the death of hogs arising from the alleged negligent failure of the carrier to deliver the same within a reasonable time, this court holds that the answer to a telephone inquiry as to their arrival, of the railroad telegraph office, was admissible as showing *prima facie*, that the same came from a servant of the company, and declines to interfere with judgment for plaintiff.

[Opinion filed May 25, 1889.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Mr. H. W. WELLS, for appellant.

Mr. GEORGE B. FOSTER, for appellee.

LACEY, P. J. This was an action originally commenced before a justice of the peace to recover from the appellant the loss or damage to a certain carload of hogs shipped by the appellee on the appellant's railroad, from Dunlap station in Peoria county, consigned to Fifer & Co., Peoria, Ill., caused by the death of eleven of the hogs from heat while in Peoria, before delivery to the consignee. The recovery in the Circuit Court was \$161.09. There is no dispute as to the value of the hogs lost, or that the judgment is too large, if the recovery is rightful. The case was tried by the court without a jury.

The appellant agreed to transport the carload of hogs from Dunlap to its freight station at Peoria, ready to be delivered to the consignee, or to the agent of the connecting railroad in case it was to be forwarded from the freight station of appellant; and this appellant well understood, as it finally delivered the car to the connecting road without any further orders or notice. It appeared that the hogs were to be forwarded beyond the freight station of appellant, to wit, from the brewery at appellant's freight station to the stock yards, a distance of two or three miles, and that the P. & P. U. R. R. was the connecting line. It appears that the hogs arrived at appellant's station at the brewery at about 5:30 o'clock P. M., and were not delivered to the connecting line till 8:30 o'clock P. M., and not finally delivered by the P. & P. U. R. R. to the stock yards till 10:30 o'clock P. M., and were immediately unloaded, when eleven of the hogs were found dead, caused, no doubt, by the heat and delay. It appears that the hogs must have been side-tracked before delivering them to the P. & P. U. R. R. Co. about three hours, and were not delivered till two hours later to the consignees at the stock yards.

It appears from the contract of shipment that one John Oglesby accompanied the hogs in transit from Dunlap as the agent of appellee, and the car was to be in sole charge of Oglesby during the transit, and the railroad company was to assume no responsibility for the safety of the stock so in charge of the shipper's agent, whether from theft, heat * * * reasonable delay of transit, or from any other cause or accident or injury except gross negligence of the company.

We are of the opinion that the evidence supported the finding of fact by the court below, that the appellant was grossly negligent in not delivering the carload of hogs to the connecting line, and keeping it on its side-track for three hours without either notifying the consignees or the agents of the connecting line of the fact of the arrival, and not making the transfer immediately. There is no evidence to show that it made any effort to make the transfer, but the evidence shows that appellant kept the hogs three hours, and

even misled the agent of the consignees by stating, at least twice, in answer to calls, that the hogs had not arrived.

About half past five o'clock the salesman, Beal, of the consignees, went to the Rock Island telegraph office and asked for the stock from Dunlap, and the operator said they did not have it; and near seven he again inquired, by telephone, of the C., R. I. & P. telegraph office, where, generally, consignees got their information, and some one answered that they had no stock for stock yards, from Dunlap. It is true that the telephoning and answer is objected to by appellant's counsel, but we think it is proper, at least *prima facie*, as showing that the answer came from the agents of appellant. In addition to this, while the evidence showed this long, unexplained delay in holding the stock by appellant before making the transfer, the appellant did not introduce a witness to show that the fault of not making the transfer was on the P. & P. U. R. R. Co. It did not attempt to show that it even notified the connecting company that the cars were there for transfer. We think that the evidence, unexplained, was such that the court below might reasonably find that the carload of hogs, after its arrival in Peoria, was lost, as far as the knowledge of its officers were concerned, for the three hours before its transfer.

It is attempted to throw the responsibility of this failure to use diligence in making the transfer on Oglesby, the appellee's agent. But, by the contract, the agent's responsibility ceased after the transit to Peoria; and although the contract is very liberal in casting every hazard and duty on the agent, we think it fails to make it his duty to make the transfer in a reasonable time. That was the duty, by the contract, the appellant was to perform. And besides that, Oglesby reported the arrival to the consignees at about seven o'clock, but even then the latter could get no tidings from the appellant's agents of the carload of hogs. In this, also, appellant was negligent. We think the court below was fully justified in its findings.

Judgment affirmed.

Muckay v. Pulford.

HENRY MACKAY, ADMINISTRATOR,

v.

GABRILLA PULFORD.

Administration—Claim of Administratrix—Sec. 72, Chap. 3, Starr & C. Ill. Stats—Limitations—Subsequent Promise—Partnership.

1. A partnership debt is joint and several, and a creditor may either proceed against assets in the hands of a surviving partner, or against the estate of a deceased partner, and a failure to pursue partnership assets can not be relied upon as a defense, when suit is brought against the estate.

2. Upon a claim filed by a widow and administratrix against the estate of her deceased husband, to recover money paid out by her in his lifetime, in behalf of a partnership of which he was a member, this court declines to interfere with the verdict in her behalf.

[Opinion filed May 25, 1889.]

APPEAL from the Circuit Court of Carroll County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Mr. J. M. HUNTER, for appellant.

Messrs. JAMES SHAW and GEORGE L. HOFFMAN, for appellee.

UPTON, J. The appellee is administratrix of her deceased husband, Charles Pulford.

On the 14th day of April, A. D. 1888, she filed a claim against her husband's estate in the County Court of Carroll County, and the appellant was appointed by the court to appear and defend for the estate as special administrator, pursuant to the provisions of Sec. 72, of Chap. 3, Starr & C. Ill. Stats. Thereafter proceedings were had in the County Court upon said claim, which resulted in an appeal to the Circuit Court of said Carroll County. A trial was had in that court with a jury, which resulted in a verdict of \$650 for the appellee, and judgment was rendered upon that verdict. From that judgment an appeal was taken to this court on behalf of the estate by its temporary administrator.

It appears from the record before us, that some years prior to his death, the deceased had been engaged in carrying on a meat market in Larana, in Carroll county, in partnership with one Charles Benedict, his step-son, under the firm name of Pulford & Benedict. This firm became financially embarrassed, to relieve which, and to obtain means to purchase stock to carry on said business, they borrowed money upon two different occasions, at one time from Anna Rourke, at another from Flora Eaton, giving to the former a note for \$335, due in one month, and to the latter a note for \$230, due one day after date, and dated respectively on the 23d day of December, A. D. 1880, and the 15th day of October, A. D. 1881. Upon the trial in the Circuit Court it was claimed that the appellee in fact signed both of above mentioned notes as surety for the firm of Pulford & Benedict, and that she paid both of said notes, principal and interest, in installments at different times as she could obtain the money. It is not claimed that appellee was a member of that firm, or had any interest in its business affairs, further than to aid her husband and son in their business venture.

The appellee was, at the time of the execution of these notes and obtaining the money thereon and long afterward, engaged in the millinery business in her own name in Larana in said Carroll county. As to the \$335 note, Anna Rourke, the payee thereof, testified that Pulford & Benedict got the money, that appellee signed the note in her own house before she would let the money go, and that she would not give the money to Pulford & Benedict, until appellee had signed the note, and that it was borrowed for Pulford & Benedict; that the note was paid in installments to her by appellee in full. The last installment was paid some two or three years prior to the June term of the Circuit Court of Carroll County for the year 1888.

As to the other note for \$230, Mrs. Eaton, the holder thereof, testified that the note was given by the firm of Pulford & Benedict, and was paid by appellee, the last payment having been made by her in August or September, A. D. 1883. Charles Benedict testified that the money for which

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both notes were given, was obtained for the firm of Pulford & Benedict, of which he was a member, and that the money was put into the business of that firm, and was never paid back to the appellee. He further testified, that to the best of his recollection, appellee also signed the note due Mrs. Eaton; that these two notes to Mrs. Rourke and Mrs. Eaton were the only notes against the firm, and the only notes ever given by the firm to those parties. That some two years after the dissolution of said firm, he paid \$50 to apply on the Eaton note from the assets of the firm.

It was claimed by appellant in the Circuit Court, and the claim is renewed in this court, that no recovery should be had in this case upon two grounds: first, because no valid claim was shown to have existed against Charles Pulford at the time of his death, for the money paid by appellee upon these notes; that at most it was a voluntary payment, and wholly unauthorized by him; and second, that the statute of limitations of five years barred any recovery in case a valid claim against deceased, Pulford, ever did exist.

It is the settled law in this State, at least, that a partnership debt is joint and several, and a creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner, or against the estate of the deceased partner. Nor will the *laches* of the creditor in following the assets of the firm preclude a recovery. The creditor has the right to proceed against the estate of such deceased partner, at any time before the statute of limitations has run, and a failure to pursue the partnership assets, if any there should be, can not be relied upon as a defense when suit is brought against the estate. *Mason v. Tiffany*, 45 Ill. 392; *Silverman v. Chase*, Ex'r, 90 Ill. 37.

It was insisted by appellee in the Circuit Court on the trial of this cause, that the payments upon the notes of the partnership to Mrs. Rourke and Mrs. Eaton by appellee, would take the entire amount called for by these notes out of the statute, and if it did not have that effect, a new promise was relied upon to remove the bar of the statute. It appears from this record that this co-partnership of Pulford & Benedict was dissolved in February, 1881. Between that period

and the death of Charles Pulford, which occurred in October, 1887, appellee had endeavored to obtain payment in whole or in part of the money so paid by her on these two notes from the said Charles Pulford. They were then living in the same house as husband and wife, his health declining. Appellee, being engaged in business, employed a domestic, one Mary Chapman, for a period of about six months, to do the housework and aid in caring for Charles Pulford in his sickness, for which appellee personally paid \$3.50 per week. Mary Chapman testified that while so employed in January, 1887, she heard appellee and Charles Pulford, her husband, talking about the Anna Rourke and Mrs. Eaton notes, and in regard to the payment thereof; that Mr. Pulford was in the bed in the sitting-room. Appellee asked Mr. Pulford "what she would do about those notes." He replied, "Don't you worry, I will pay you for those notes." Appellee replied. "Supposing you would die, what will I do then?" Mr. Pulford said, "Well, you can get it out of the estate." It is unnecessary for us to pursue the evidence in this case to any greater extent, nor are we called upon to determine the legal effects of payments made upon these notes by appellee. The jury was fully instructed as to the law applicable to the case, and no complaint is made in regard thereto.

The questions involved were in the main questions of fact and for the jury to determine, and we think the jury were fully justified by the evidence in the verdict rendered, and the Circuit Court did not err in rendering judgment thereon. Finding no error in this record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

S. S. KEYSER

v.

ORA J. MANN.

*Trespass—Way—Prescription—Jurisdiction of Justice—Limitations
—Evidence—Instructions.*

Keyser v. Mann.

1. In an action of trespass brought for the recovery of damages for obstructing a way, this court holds that the plaintiff is entitled by prescription to the use thereof, and that the justice had jurisdiction of the controversy involving the same.

2. In such actions the running of the statute of limitations is not interrupted by the death of the original grantor.

[Opinion filed July 1, 1889.]

APPEAL from the Circuit Court of Peoria County; the
Hon. T. M. SHAW, Judge, presiding.

Messrs. ISAAC C. EDWARDS and J. M. HARNIT, for appellant.

An easement being connected with and appurtenant to real estate, so far partakes of the character of land that it can only be acquired by grant or prescription, which implies a previous grant. The declaration of appellee's grantor, whether made before or after his conveyance, were not admissible to prove the grant. *Forbes v. Balenseifer*, 74 Ill. 183; *Washburn on Easements*, 32.

If it was not a public road, then, inasmuch as appellee does not claim the strip of ground by grant from Joseph Bohrer, it was either the private property of the heirs of Joseph Bohrer, or it had been given to the citizens of Oak Hill. In either case appellee could not sue in her name for trespass to it. It was not such an injury to her real estate as a justice would have jurisdiction of by the justice act. The damage to appellee, if any, would be consequential and not direct. A justice of the peace has no jurisdiction in actions on the case. *Stuckey v. Churchman*, 2 Ill. App. 584; *Horne v. Mandelbaum*, 13 Ill. App. 607.

At the time Joseph Bohrer sold the eighty acres to appellee, he did not own the surrounding land, except the strip in controversy, and she could not get an easement over that by necessity. *Kuhlman v. Hecht*, 77 Ill. 570.

The right claimed by appellee was, that she had the use of the drive-way over the vacant ground in common with the public. It does not appear to us that this was of that exclusive, adverse and marked character which is sufficient to prove

the prescription upon which the appellee relies. It was in no degree injurious to the owner of the soil, and therefore not likely to produce any resistance on his part, and was merely permissive. *Donnell v. Clark*, 19 Me. 174.

If the occupation was permissive, and not adverse to the owners of the soil, no right by prescription could be acquired. *Parker v. Farmingham*, 8 Met. 268.

In the case of *Kyle v. Town of Logan*, 87 Ill. 64, Judge Breese held that the public did not acquire a public road over vacant and uninclosed land by travel over the same for twenty years or more, merely from acquiescence on the part of the owner; and that acquiescence by the owner, with the knowledge of such travel by the public without objection, was not sufficient to give a road to the public by prescription. The same doctrine is held in *Fox v. Virgin*, 11 Ill. App. 513.

Messrs. JACK & TICHENOR, for appellee.

Counsel for appellant contends that the justice had no jurisdiction in this case, and this question we will consider first. That portion of the statute here applicable provides that the justice's jurisdiction shall extend to "actions for damages for injury to real property, or for taking, detaining or injuring personal property." Chy. P. 79, Par. 13, Clause 2. It was the evident intention of the Legislature in passing this act to extend the jurisdiction of justices to all classes of cases involving injuries to real property, and not to limit its application to some particular line of injuries, otherwise apt terms would have been introduced indicative of its scope. Indeed, the very statute relating to this subject in force prior to the passage of this act in 1873 provided, "The jurisdiction of justices of the peace is hereby extended so as to include all actions for trespass upon real estate, where the sum claimed does not exceed \$100." Laws of 1855, Feb. 15, Par. 139, Sec. 1. By that law the justice had jurisdiction to the extent now claimed by opposing counsel. If the law of 1873 does not extend this jurisdiction, what was the object of the legislation? The passage of this act was either a work of supererogation, or it operated to extend the jurisdiction to include "actions for

damages for injury to real property," as it declares. The language of the statute is broad and comprehensive, free from limitation, and couched in words clear and unambiguous.

This precise question was before the Appellate Court in *Chicago & Alton R. R. Co. v. Calkins*, 17 Ill. App. 55. In rendering its decision, the court says: "By Clause 2, Sec. 13, Ch. 79, R. S., that officer has jurisdiction in 'actions for damages for injury to real property, or for taking, detaining or injuring personal property.' The expression here used, 'injury to real property,' is about as comprehensive as could well be devised, and would seem to embrace all injuries, whether direct or consequential, and this we understand to be the view taken by the Supreme Court in *Lachman v. Deisch*, 71 Ill. 59. We are of the opinion the justice had jurisdiction." The opinion in the case cited from the Supreme Court is equally strong and to the same effect.

Appellee maintains that, by continuous user and enjoyment of the way in question for more than twenty years, if not otherwise, she has acquired a right therein by prescription, which no one can lawfully disturb, and the law applicable to the undisputed facts shows clearly and satisfactorily that her position rests upon solid foundations.

In *Coolidge v. Learned*, 8 Pick. 504, the court says: "It has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and un rebutted, imposes on the jury the duty to presume a grant, and in all cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long continued possession should not be disturbed." This is the law in Illinois as well as in every other State in the Union. *Vail et al. v. Mix et al.*, 74 Ill. 127; *Ballard v. Struckman*, 123 Ill. 636.

The essential elements of adverse user are succinctly and correctly stated in *Garrett v. Jackson*, 20 Pa. St. 331. The court there says: "Where one uses an easement whenever he sees fit, without asking leave and without objection, it is

adverse, and an uninterrupted adverse enjoyment for twenty-one years" (the period of limitation for quieting titles in that State) "is a title which can not afterward be disputed. * * * The owner of the land has the burden of proving that the use of the easement was under some license, indulgence or special contract inconsistent with a claim of right by the other party." And likewise in Massachusetts it has been held that the enjoyment of the right to flow another's land for twenty years, if unexplained, will raise a presumption of grant, although no actual damage could be shown to be occasioned thereby. "It may be deemed adverse, if in any degree it tend to impose any servitude or burden on the estate of another." *Williams v. Nelson*, 23 Pick. 141; See, also, *Grigsby v. Clear Lake Co.*, 40 Cal. 406.

In Washburn on Easements and Servitudes, 156, the author says: "It is not, however, necessary to show that the act which forms the basis of the prescription did any actual damage to the party against whom it is claimed, provided it was an invasion of his right." "And if there has been the use of an easement for twenty years unexplained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant unless contradicted or explained." Citing *Miller v. Garlock*, 8 Barb. 153; *Chalk v. M'Alily*, 11 Rich. 153; *Williams v. Nelson*, 23 Pick. 141, 147; *Blake v. Everett*, 1 Allen, 248; *Union Water Co. v. Crary*, 25 Cal. 509; *School District v. Lynch*, 33 Conn. 334; *Ingraham v. Hough*, 1 Jones (N. C.), 39; *Olney v. Fenner*, 2 R. I. 211; *Richard v. Williams*, 7 Wheat. 59, 109, and many others.

In *Cox v. Forrest*, 60 Md. 74, a case strikingly similar to this was before the court. Judge Robinson, in delivering the opinion of the court, says: "This is an action to recover damages for obstructing a private right of way claimed, over the land of appellee. In the absence of an express grant, it was necessary for the plaintiffs to prove an adverse, exclusive, and uninterrupted enjoyment of the right of way in question for twenty years.

"By *adverse* is meant *user* without license or permission,

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for an adverse right of an easement can not grow out of a permissive enjoyment, the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right. Where one, however, has used a right of way for twenty years unexplained, it is fair to presume the user is under a claim of right, unless it appears to have been by permission. In other words, the use of a way over the lands of another whenever one sees fit, and without asking leave, is an *adverse* use, and the burden is upon the owner of the land to show that the use of the way was by license or contract inconsistent with the claim of right."

In *Hammond v. Zehner*, 23 Barb. 473, the court says: "The answer states that the dam had been erected upward of twenty years, and that the defendant, and those under whom he claimed, had been in the actual and peaceable possession and occupancy of the dam and its appurtenances for upward of twenty years, for the purpose of supplying the defendant's grist mills, and that the dam had been kept up at its present height. And these facts were proved. Upon this evidence, and unless some evidence was given by the plaintiff to rebut it, by showing that the defendant's occupation, so far as related to flow of water raised by the dam upon his land, was by leave or license, or without claim of right, was sufficient to authorize the jury to imply a grant of the easement. The question was for the jury, upon the evidence. The burden of proving an adverse possession is on the party claiming the easement. But the use of an easement twenty years, unexplained, will be presumed to be under a claim or assertion of right and adverse, and not by leave or favor of the owner. 3 Kent, 442; 3 East, 277, 300; 14 Mass. 53; 3 Bing. 115. If the party claiming the easement shows an open and uninterrupted enjoyment for twenty years, * * * proof must come from the other side to show that such use of the defendant's land was by license or permission, or that it was restrained or limited in point of time. *Finch v. Partridge*, 2 Ver. R. 391; *Cross v. Lewis*, 2 B. & Cress. 686; 8 Barb. 155; 19 Wend. 366." See, also, *Tickle v. Brown*, 4 Ad. & E. 369; *Garrett v. Jackson*, 20 Pa. St. 331; *School District v. Lynch*, 33 Conn. 334.

* C. B. SMITH, J. This suit was commenced before a justice of the peace and resulted in a verdict for appellee for \$13, and on appeal to the Circuit Court on a trial there had, resulted in a verdict for appellee for \$1, and after overruling a motion for a new trial, the court rendered judgment on the verdict. Appellant brings the case here on appeal and asks for a reversal of the judgment.

The facts out of which this suit grows are about these: In 1856 Joseph Bohrer owned considerable land in Rosefield township, and among others, sections 6, 7 and 12, or parts of them at least. He laid out about that time the village of Oak Hill. In 1867 he sold appellee, Mrs. Ora J. Mann, the east half of the northeast quarter of section 12, the northern portion of this eighty-acre tract lying immediately west of the southern portion of the corporate line of the town of Oak Hill. It seems that for several years before Bohrer sold the land to Mrs. Mann, he had access to it over a road extending from Depot street in the village, in a westerly direction, over a small piece of vacant ground, to the farm; this road runs along under a high bluff on one side, and a swamp on the other side, and is and always has been the only way to reach this eighty-acre farm from the town. This strip seems to have belonged to Bohrer, when he deeded the eighty to Mrs. Mann. So far as we can gather from this record, this strip of land seems to be very narrow and small and to be of little or no value except for the purpose of a road for Mrs. Mann to get to her farm, and to get to a sand bank which is a valuable part of her farm. At the time the deed was made to Mrs. Mann, Bohrer owned this strip of land and then assured Mrs. Mann that the road would forever remain open, and would furnish her an outlet from her farm. The proof is clear that she and her tenants, and those hauling sand off her farm have used this strip of land since she bought it in 1867, and that it had been used by others for ingress and egress to the farm and sand bank for many years before, reaching back as far as forty years, and that it has always been in substantially the same track. This was the condition of things until in 1888, when appellant Keyser shut up and obstructed this roadway

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by ditches and fences under the direction of William Bohrer, one of the heirs of Joseph Bohrer, who sold the land to appellant. Appellee brought suit for this obstruction before a justice of the peace, and claims damages; she claims the road as a private right of way on two grounds: first, by prescription, and second, as a road appurtenant under the deed to her from Joseph Bohrer.

We think the proof clearly establishes the plaintiff's right to use this road by prescription; she herself has been using it constantly since 1867, and the proof is that her grantors and others, through whom she holds title, had been using the road for nearly forty years. With this view of the case it is unnecessary for us to consider whether she had the additional right to use the road as appurtenant to her purchase and deed when she bought from Bohrer. We think also the justice had jurisdiction under the statute. *Chicago & Alton R. R. Co. v. Calkins*, 17 Ill. App. 55; *Lachman v. Deisch*, 71 Ill. 59.

The refusal of the court to allow the evidence of witness to show the death of Joseph Bohrer, the original grantor, in order to interrupt the running of the statute of limitations, was not error, as when the statute begins to run, it continues even after the death of the original owner.

The refused instructions were properly refused because they were not applicable to the issues being tried, as there was no doubt nor claim that appellee was not in the actual possession of the road just prior to and at the time it was obstructed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1889.

36	604
48	184

SPOOR MACKAY
v.
BELLE PLUMB.

*Creditor's Bill—Fraud—Injunction—Dissolution—Sec. 12, Chap. 69,
R. S.—Damages—Estoppel.*

1. Where an injunction is an important part of the relief sought in a given case, solicitor's fees are allowable upon dissolution thereof, as part of the damages, where the services were rendered in connection therewith. Fees for services in and about a branch of a given case, independent of the injunction, should not be included.

2. In the case presented, this court holds that the fees in question were incurred in defeating the action; that the dissolution of the injunction necessarily followed as incidental to that result; that the only damage sustained by reason of the injunction was the delay in the payment to defendant upon her execution, that she was duly compensated therefor, and that the portion of the decree allowing as damages such fees can not stand.

[Opinion filed May 24, 1890.]

IN ERROR to the Circuit Court of McLean County; the Hon.
OWEN T. REEVES, Judge, presiding.

MESSRS. KERRICK, LUCAS & SPENCER, for plaintiff in error.

(604)

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“The rule is, that costs and expenses, reasonable in amount, incurred for the object of obtaining a discharge of the injunction, are allowable as a part of the damages by reason of the injunction. But where counsel fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incidental to the result, such fees and expenses are not allowable.” Bailey, J., in *Field v. Medenwald*, 26 Ill. App. 642, and see *Gerard v. Gateau*, 15 Ill. App. 520; *Wilson v. Hecker*, 85 Ill. 349; *Blair v. Reading*, 96 Ill. 130; *Moriarty v. Galt*, 125 Ill. 421; *High on Injunctions*, Sec. 1685; *Rosenthal v. Boas*, 27 Ill. App. 430.

Messrs. BENJAMIN & MORRISSEY and J. P. LINDLEY, for defendant in error.

Where a permanent injunction is an important part of the relief sought, counsel fees are allowable as part of the damages, whether the injunction was dissolved by an interlocutory order on motion for that purpose, or on final hearing. *Darst v. Gale*, 83 Ill. 136, 144; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282, 287; *Corcoran v. Judson*, 24 N. Y. 106, 109; *Solomon v. Chesley*, 59 N. H. 24, 25; *Thomas v. McDonald* (Iowa), 42 N. W. Rep. 301-2; *Directors v. Trustees*, 66 Ill. 247.

The statute under which the damages in this case were assessed, provides as follows:

“In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same.” Sec. 12, Chap. 69, R. S.

PLEASANTS, P. J. Plaintiff in error filed his bill in equity October 1, 1887, setting forth that he was a creditor of Bailey Plumb, by a judgment of August 8, 1887, for about \$3,000 upon a note of November 19, 1886, given for goods sold and

delivered, on which execution had been issued and returned *nulla bona*; that on the 27th of June next preceding, said Bailey conspiring with defendant in error, who was his daughter and bookkeeper, confessed judgment in her favor for \$1,020, when there was in fact no indebtedness to her; that under execution issued thereon, all the property of said Bailey liable to execution had been sold, and the proceeds, about \$800, were in the hands of the sheriff; that defendant in error was not financially responsible; that her judgment was fraudulent and void as against complainant, and if not, that she was estopped to enforce it as against him for reasons stated. It prayed an injunction to restrain the payment over to her by the sheriff of the money so in his hands; that her said judgment be set aside and declared void as against complainant, and said money applied toward satisfaction of his claim. Belle Plumb, Bailey Plumb and the sheriff were made parties defendant.

On this bill an injunction was ordered and issued. Defendants Plumb filed separate answers, denying the allegations relating to fraud and estoppel, and upon said answers sworn to and supported by affidavits, filed a motion to dissolve it.

Notice of the motion was given on October 11th for the 17th, but whether it was ever argued the record does not show and counsel do not agree; but the court took no action upon it until the final hearing, when upon the pleadings and evidence and master's report a decree was made simply dismissing the bill at complainant's costs. On the same day a suggestion of damages was filed by defendant Belle Plumb. From that decree an appeal was taken to this court, where it was affirmed. See 29 Ill. App. 245. The case was then re-docketed in the Circuit Court and an additional or amended suggestion filed, claiming for fees paid for services of solicitors on the appeal and for printing briefs; and on evidence heard, the court allowed her \$158 of which \$58 was for delaying the payment on her execution, and the residue for solicitor's fees. Thereupon complainant sued out this writ of error and here complains of the allowance last mentioned.

Under Sec. 12, Chap. 69, R. S., plaintiff in error could

rightfully claim only such damages as she sustained "by reason of the injunction." Her payment of, or liability for reasonable solicitor's fees is regarded as a damage to the amount of such fees; and the only question is whether she paid or became liable for any in this case by reason of the injunction. That is to be determined by ascertaining whether any services were properly required of, and rendered by the solicitors which would not have been so required if there had been no injunction. From the pleadings and evidence in the record, we are unable to discover any such.

It is said the injunction was the gist of the bill, and that the trial of the whole case was necessary to determine whether it was rightfully or wrongfully sued out.

We think the first of these propositions is not true in fact or law, and that from the other, though true, the consequence claimed would not necessarily, and in this case does not, follow.

If the defendant, Belle Plumb, was pecuniarily irresponsible, as the bill alleged, that was an accidental circumstance, which made the injunction proper and important, but it was not at all material to complainant's right to the relief sought, nor was the injunction any part of that relief. Upon the other facts alleged his right was to have the proceeds of Bailey Plumb's property then in the hands of the sheriff applied upon his judgment, and that would have been none the less his right if she had been responsible. The relief sought was their actual application in that way. It was immaterial to him by whom they should be so applied, whether by the sheriff or by the defendant. But since the sheriff then had them in his possession, and might, by paying them over to her, put them beyond his reach or that of the court before he could prove the facts on which his right depended, the injunction was proper, simply as a means of securing the relief sought. In any event it could operate only for a time. It would be dissolved by a failure to make such proof or become *functus* upon compliance with the order that would follow the making of it. Had he paid these proceeds to her and no injunction been issued, would she not, upon the facts alleged in the bill, have been chargeable with them as trustee

for the complainant? Her need of solicitors, then, was to defend against the allegations of fraud and estoppel to prevent a decree declaring her judgment inoperative as against complainant and requiring her to pay over these proceeds to him if she had received them, which was neither occasioned nor enhanced by reason of the injunction.

As defendant in interest to a creditor's bill, to be most affected by the decree, it would have been no less necessary for her to have the whole case tried as it was tried and everything done that was properly done, had there been no injunction. The motion to dissolve it was premature and improper since it practically involved the whole case on the merits, which should not be determined upon *ex parte* proofs; and the action of the court, which, in effect, overruled it, was right. But while the trial was necessary to determine the right to the injunction, it was not the injunction that made the trial necessary.

Counsel seem to rely on the case of Darst v. Gale, 83 Ill. 136, where the court in commenting on the statutes say: "This clearly covers all cases, as well where the injunction is but a part of, or incident to the principal relief sought, as where it is the sole object of the bill; and the damages to be assessed are such as have been sustained, without regard to whether the injunction was dissolved by an interlocutory order or motion for that purpose, or on final hearing." But the court expressly reaffirmed the rule so often declared, that "the proof should be confined to expenses incurred in consequence of the injunction, and it would be improper to include attorney's fees for services rendered about a branch of the case independent of the injunction;" and found that "the evidence showed, with reasonable approximation, what expenses (services) were rendered in consequence of the injunction, disconnecting that from the other branches of the case." We perceive nothing here in conflict with the rule as stated in Field v. Medenwald, 26 Ill. App. 643, that "costs and expenses, reasonable in amount, incurred for the object of obtaining a discharge of the injunction, are allowable as a part of the damages by reason of the injunction. But where counsel fees

and expenses are incurred in defeating the action, and the dissolution of the injunction is only incidental to the result, such fees and expenses are not allowed." We are of the opinion that the fees in this case were incurred in defeating the action, and the dissolution of the injunction necessarily followed as incidental to that result. In its decree the court simply dismissed the bill, without referring to the injunction. The rule and its application are well stated and illustrated in *Moriarty v. Galt*, 125 Ill. 421, which seems to us to be conclusive against the claim here in question.

The only damage sustained by reason of the injunction that we can discover from the record, was the delay in the payment to defendant on her execution, and that was compensated by the allowance of \$58, to which no objection is made.

For the reasons indicated the decree as to the \$100 for solicitor's fees will be reversed, and as to the rest affirmed. The costs of this court to be equally divided between the parties.

Reversed in part and in part affirmed.

NANCY WILLEY

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Nuisance—Criminal Code—Sec. 221—Highway—Obstruction of—Acceptance—Evidence—Instructions.

1. To establish a highway by dedication, acceptance is as essential as the offer. Nor will it be presumed from the offer, though beneficial, where it also imposes a burden, and like the offer, acceptance must be proved by some certain unequivocal act satisfactorily showing the intention.

2. The intention on the part of the owner may be manifested in writing, or by declarations, or by acts *in pais*. A survey and plat alone may suffice and there can be no doubt that the streets and alleys of an incorporated town or village, used and recognized as such by the public, are highways to be protected against obstruction in the same manner as other public roads.

3. The acceptance of an offer of dedication can be proved by a municipality, only by its own act, or that of those authorized in such matters to represent it.

4. To establish a public duty to keep open and in repair a highway by dedication, to treat any and all obstructions of it, by any and all persons, as nuisances, acceptance must be shown by something more than travel alone.

5. The mere fact that a highway is traveled over by whoever has occasion, or sees fit to do so, is not sufficient evidence of dedication.

6. Upon an information charging defendant with obstructing two streets and a public alley by erecting a fence, the contention being as to whether said streets had ever been dedicated to and accepted by the public, this court holds that there is no evidence of such acceptance as the law requires, and that the verdict against the defendant can not stand.

[Opinion filed May 24, 1890.]

IN ERROR to the County Court of Christian County; the
HON. W. E. NELSON, Judge, presiding.

Messrs. A. McCASKILL, J. G. DRENNAN and F. P. DRENNAN,
for plaintiff in error.

Messrs. J. C. CREIGHTON and JAMES B. RICKS, for defendant
in error.

PLEASANTS, P. J. This was an information in five counts under Sec. 221 of the Criminal Code, charging plaintiff in error with obstructing two public streets and a public alley "in the town of Willey," and also a public highway described, respectively, by erecting a fence across them. She was found guilty on the first three relating to the streets and alley; and motions for a new trial and in arrest having been overruled, judgment was entered on the verdict, imposing a small fine and ordering the abatement of said nuisance.

In May, 1870, a plat of the town was made in the name of Israel Willey, who then was, and until his death in 1872 remained in possession as owner of the land, excepting five or six of the lots, which he had meanwhile conveyed to different parties by description according to the plat. The plat, however, was never recorded. He devised all his real estate to his five sons, one of whom, W. H. H. Willey, having acquired the interest of the others, in January, 1876, caused another survey and plat to be made, which was like the first, and being certified and acknowledged, was recorded on the

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7th of February. On that day also he acknowledged a deed dated on the 4th from himself and wife, of two lots described according to said plat.

The town as platted is located on a small triangular tract bounded by the east and south lines of the section (which is Sec. 6, in T. 13 N., R. 1 W. of the 3rd P. M.) and the grounds of the W., St. L. & P. Railroad. It consists almost wholly of two fractional blocks (2 and 3) of twelve lots each, and two streets. Front street, thirty feet in width, runs northeast and southwest, parallel with and adjoining the railroad grounds. Lincoln street sixty feet in width, is at right angles with it, commencing opposite the station and running southeast to the corner of the section, where it intersects a public highway. It separates the two blocks. The alleys are parallel with Front street. Six or seven buildings were erected on these lots, including a blacksmith shop, and a store in the westerly block, fronting on Front street, in which a post-office has been kept for fifteen years, and a school house on the other, south of the alley. It does not appear that any has been erected since 1876, and we infer that the proprietor of the town purchased some of the lots that had been sold by his father, since he conveyed to plaintiff in error, in January, 1880, the S. $\frac{1}{4}$, S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, and "also the town of Willey, situated on said lands, except lots 1, 7, 8 and 9 of block 2, and lot 1 of block 3, in said town." Lot 6 of block 3, which had been previously conveyed to Charles Hall, and lot 5, on which is the school house, are not excepted. There is nothing in the location of the buildings nor in anything else on the land to indicate the location or existence of any street. More than half of Front street as platted, the whole length of which is only about 900 feet, and nearly half of Lincoln, the whole length of which is only about 420 feet, were never used for travel. Almost all of the business of the place was done at the store and post-office, which was on Front street. In order to reach it, of course, it was necessary to use that part of the street which was immediately in front of it. Travel from the west would also naturally use that part which was west of it. But the east part

was covered by an orchard and evergreens, so that travel from that direction came by the highway on the section line to Lincoln street and then on that street as far as the alley, a distance of little more than half a block, where it turned more westerly, across the open lots 10 and 11 of block 2, to Front street just east of the store.

It is conceded that the town or village of Wiley was never incorporated. Plaintiff in error lived on block 3. According to the evidence, she built a fence across both the streets, but it is not clear that it touched the alley. The defense she set up was that these streets and the alley were not public highways; and the sole ground on which the prosecution claimed they were being their alleged dedication, the only question of fact was whether they had been dedicated.

In this connection, the term dedication is sometimes used to signify the act of the proprietor alone, constituting his offer to the public, and which, until accepted, is only an offer (*Littler v. City of Lincoln*, 106 Ill. 369) and may be revoked, unless private rights have intervened (*Lee v. Town of Mound Station*, 118 Ill. 304), and at others to include also that of the beneficiary, constituting its acceptance. But to establish a highway by dedication, acceptance is just as essential as the offer. *Ill. Ins. Co. v. Littlefield*, 67 Ill. 368 and cases there cited. Nor will it be presumed from the offer, though beneficial, where it also imposes a burden. *Littler v. City of Lincoln*, *supra*; *Hamilton v. C., B. & Q. R. R. Co.*, 124 Ill. 243. It must therefore be proved, like the offer, by some unequivocal act, satisfactorily showing the intention. *Grube v. Nichols*, 36 Ill. 92; *Fisk v. Town of Havana*, 88 Ill. 208.

The intention on the part of the owner may be manifested in writing, or by declarations, or by acts *in pais*. A survey and plat alone, may suffice. *Smith v. Town of Flora*, 64 Ill. 93; *Maywood Co. v. Village of Maywood*, 118 Ill. 69. And there can be no doubt that the streets and alleys of an unincorporated town or village, used and recognized as such by the public, are highways, to be protected against obstruction in the same manner as other public roads. *Leech v. Waugh*, 24 Ill. 229.

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It may be conceded that W. H. H. Willey offered to dedicate the streets and alley here in question, and that he and those claiming under him, would be estopped to deny that they are public highways, as against the purchasers of lots described according to the plats and those claiming under them. His recognition of his father's plat and deeds according to it, and his own plat and deed according to it, imply a covenant to the purchasers that the streets and alley, as platted, shall forever be opened to the use of the public. *Zearing v. Raber*, 74 Ill. 409; *Gridley v. Hopkins*, 84 Ill. 528. It may therefore be that plaintiff in error, by her acceptance of her deed and her payment of taxes assessed upon her "lots" as shown, would be so estopped as against them.

These, however, were acts of private persons, which could not, of themselves, affect any right or duty of the public. They are not to be regarded as evidence of its acceptance of the offer of dedication. That can be proved only by its own act or that of "those authorized in such matters to represent it." In *Hamilton v. C., B. & Q. R. R. Co.*, *supra*, the Supreme Court said: "The fact that the lots in the subdivision were assessed as such, does not show an acceptance," and cite approvingly a Michigan case in which it was held, that "the assessing officers do not represent the public for the acceptance of dedications."

In *Gentleman v. Soule*, 32 Ill. 280, it was said: "The acceptance must also appear, and when the public are the donees of the easement, that is usually manifested by acts, such as taking charge of and repairing the highway, by the proper county, or town authorities." Since the town of Willey was never incorporated, if the streets and alley platted were public highways, they would have been under the care of the commissioners of highways, like "other public roads." *Leech v. Waugh*, 24 Ill. 230.

In *Grube v. Nichols*, 36 Ill. 92, it was said: "And to make a sufficient dedication, the owner of the soil must devote the right of way to public use, and it must be accepted and appropriated by the public to that use by travel, and a recognition as a public highway by the proper authorities, by repairs or

otherwise. But when a dedication is relied upon to establish the right, the acts of both the donor and of the public authorities should be unequivocal," etc.

In *Ill. Ins. Co. v. Littlefield*, 67 Ill. 368, the court say: "There is no proof this supposed dedication was ever accepted by the public, acting by the proper authorities. Acceptance is essential." In *Town of Princeton v. Templeton*, 71 Id. 71, the court use the following language: "To constitute a dedication, the owner of the property must intend to make the gift, and it must be accepted by the public authorities." In *Fisk v. The Town of Havana*, 88 Ill. 209-10, the court repeat the language above quoted from *Grube v. Nichols*. In *Forbes v. Balenseifer*, 74 Ill. 187, it was said that "an acceptance can be evidenced by the public officers taking charge of the road and repairing it at public expense, or, where it needs no repair, by placing it on the map of roads for the proper district, and its being used by the public. But mere travel by the public is not evidence of an acceptance." And, further, "there is no evidence that the public accepted the dedication, if one had been intended. The evidence only shows that other persons than the parties occasionally traveled over the road. And the instruction failing to inform the jury what was necessary to constitute a dedication and its acceptance, they may have concluded, and probably did conclude, that the travel by the public was an acceptance, and was all that was required to create it a public highway."

In *Little v. City of Lincoln*, 106 Ill. 368, the court say: "It is not essential that there should be any prescribed formal act of acceptance, but there must be user, or some other act indicating acceptance, by those authorized in such matters to represent the public, to complete the dedication."

In *Hamilton v. C., B. & Q. R. R. Co.*, 124 Ill. 235, it was declared to be "well settled, that at common law, to make a complete dedication, there must be acceptance—not any formal act of acceptance, but that there must be user, or some other act indicating acceptance by the public authorities." See also, *Eyman v. The People*, 1 Gilm. 9; *Alvord v. Ashley*, 17 Ill. 369; *Town of Lewiston v. Proctor*, 27 Ill. 413.

We understand these cases to hold that where it is sought to establish by proof, the dedication of such a highway as would devolve upon the municipality within which it is located the burden of maintaining it, its acceptance must be shown by some act of the municipality itself, or of its officers or agents authorized to represent it in that behalf, and that the mere fact that it was traveled by whoever had occasion or saw fit so to do, is not sufficient evidence of it. It is true that in *Marcy v. Taylor*, 19 Ill. 633, Mr. Justice Walker, delivering the opinion of the court, said: "Acceptance may be shown by user by the public, as by travel, or by the acts of the public officers in repairing and keeping it up;" that "it can not be essential to the acceptance that they should repair the road, for it might never require repairs. Any other act on the part of the public which manifests an intention to accept, such as public travel and use as a highway, is as satisfactory evidence of acceptance as repairs by the officers."

That, however, was an action of trespass *quare clausum*, for taking down a fence which the defendant claimed was in a highway. And in other cases between individuals, as in trespass and ejectment at law, and upon bills in equity to restrain encroachment, similar language has been used. The owner of land who has unequivocally dedicated it to public use, and privies in estate, should be estopped to deny the right of individuals who have so used or are so using it, by his deed to them recognizing the plat or other act of dedication, or by their actual use of it alone. Otherwise the dedication would be a trap. But a distinction is made between cases of that character and those in which the public, as a body, claim or are required to establish its right by dedication. As between the parties in the former, that is, as against the owner and those claiming under him, the land in question may be a public highway for all the purposes of the suit and for all other purposes, as to the individual so claiming, and yet not a highway so accepted by the public as to bind the municipality to the duty of repairing and maintaining it. Thus in *Zearing v. Raber*, 74 Ill. 411, the court say: "It is unimportant whether the public have so far accepted the dedication as to be bound

to keep the street in repair, since the question involved is simply one of private right. * * * If appellee is entitled to have the street kept open for use, it will be sufficient." In *Hamilton v. C., B. & Q. R. R. Co.*, 124 Ill. 247, it is said: "There might well have been private rights, in respect to streets, in grantees, of conveyances made under the plat, although there may have been no complete dedication of the streets to the public by an acceptance of the proffered dedication." In *Littler v. City of Lincoln*, 106 Ill. 369, the court said: "And so until acceptance by the municipality, although the owner is estopped to deny the dedication whenever private rights intervene, the act of the owner in platting, etc., is in the nature of a mere offer to the municipality. Until the municipality accepts, it can not be bound, by mandamus or otherwise, to open or improve the streets, and until then it necessarily can have no right in the streets, as trustee or otherwise." In *People, etc., ex rel. v. Commissioners of Highways*, 52 Ill. 501, which was a petition for mandamus to compel the commissioners to ascertain, describe and enter of record in the town clerk's office a certain road, the court below had refused the following instruction asked by the respondents:

"The voluntary use of a way by the public with the assent of the owner of the soil, is not, of itself, sufficient to make it a public highway, and impose upon the proper public authorities the duty of repair;" and on the other hand gave one for the people to the effect that it was not necessary to prove the town authorities had recognized said road as a public highway, in reference to which the Supreme Court said: "In its ruling on these instructions, we think the court erred. In a question of dedication of a right of way, as between the owner and the public, the recognition of a road by the county or town authorities as a public highway, would, of course, not be necessary. As against the owner, the acceptance of the dedication may be by the general public, which can manifest its acceptance by using the road, and thus acquire a right of way. But in a proceeding of this character, the object of which is to impose upon the town the expense of building

bridges and keeping roads in repair, the question whether the county or town has ever recognized such an obligation in reference to the road in controversy, goes to the very merit of the case. * * * The owner of land can easily estop himself by laying out and dedicating a road, and having more or less persons use it in behalf of the public, but we can not hold that a municipality may thus have a highway thrust upon it for improvement and repair against the wishes of its proper officers and of a great majority of its people."

While it may be the law, then, that as against the owner of the land and those in privity of estate with him, a sufficient acceptance of the offer of dedication may be shown by travel alone, we think the clear weight of authority is, that to establish a public duty to keep open and in suitable repair a highway by dedication—to treat any and all obstructions of it by any and all persons as nuisances—acceptance must be shown by something more or less. In the case last cited, 52 Ill. 502, the court approved the rule declared in 2 Greenl. on Ev., Sec. 662, that "it does not follow, because there is a dedication of a public way by the owner of the soil, and the public use it, that the town or county is, therefore, bound to repair. To bind the corporate body to this extent, it is said there must be some evidence of acquiescence of adoption by the corporation itself. Such as having actually repaired it, or erected lights or guide posts thereon, or having assigned it to the proper surveyor of highways for his supervision, or the like."

The information here rests upon the ground that the platted streets and alley in question are public highways as against anybody who obstructs them, established as such for all purposes to the fullest extent by dedication and acceptance, and which, therefore, the public are bound to protect and maintain. But there was no evidence of any such acceptance as in our opinion the law requires. The defense offered a number of commissioners and ex-commissioners of highways of the township, to prove that these alleged highways had never been opened, worked, repaired, or in any way recognized by the highway officers; but the court refused to admit

that evidence. That it was proper, was expressly held in *Martin v. The People*, 23 Ill. 395. If its exclusion in this case was not harmful, it was only because the prosecution did not claim or pretend that they had ever been so treated or recognized. It relied wholly and solely on the fact that they had been traveled. The proof is, that short as they were they had never been traveled their whole length. Nor does it appear that any part had been traveled by anybody, with the understanding and for the reason that they were highways, or were supposed to be such. The defendant and the man who built the fence for her testified that they did not know, and there was nothing on the ground to indicate their location or extent, or any appearance of a street or alley; and no witness pretends that there was. But mere travel, however well proved, we hold to be insufficient evidence of the requisite dedication. The first instruction given for the people was, therefore, erroneous. It does not require even proof of travel, but holds the recorded plat and sale of lots according to it, to be enough. And the second also, as it requires nothing more, except proof that "said streets and alleys were used by the public." We see no reason for the refusal to give the instructions numbered 2, 3, 5, 6, 7, 10, 11 of those refused, except that some were substantial repetitions of others; but no equivalent for any or either of them was given. These errors in respect to the instructions should reverse the judgment, if there was evidence tending to show an acceptance by the public of these streets and the alley. But we think there was no such evidence, and understand that none such can be produced.

For the reasons indicated, the judgment will be reversed.

Judgment reversed.

SILAS E. WARRICK

v.

SEXTON E. SMITH.

Deed—Error—Reformation.

1. In cases where it is sought to reform a written instrument upon the ground of a mutual mistake, it is necessary that the mistake be clearly and satisfactorily established. The fact alleged, and the relief sought, must be clearly and satisfactorily established. The evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. The relief is not granted upon a certainty of error.

2. In proceedings of this character, where, all the facts being considered, the court entertains a certain conviction that the deed is true, it will decree accordingly, though there may be some points in the case. There must be a higher degree of proof than can be had from the mere preponderance of the evidence.

[Opinion filed May 24, 1890.]

IN ERROR to the Circuit Court of Macon County.
E. P. VAIL, Judge, presiding.

MESSRS. JOHNS & RANDOLPH, for plaintiff in error.

MESSRS. MILLS BROS., for defendant in error.

WALL, J. This was a bill in chancery to reform a deed, and to reserve the crops growing upon the land. The deed was for complainant; error is assigned thereon. The question is whether the proof sustains the bill.

In cases where it is sought to reform a written instrument upon the ground of a mutual mistake, it is necessary that the mistake be clearly and satisfactorily established. The fact alleged, and the relief sought, must be clearly and satisfactorily established. The evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. 1 Story E. 151. The remedy of reformation will not be granted.

bility or upon a *mere* preponderance of evidence, but only upon a certainty of error. 2 Pom. Eq. Jur., Sec. 859. The stringent rule thus laid down by the text writers is eminently a just and necessary one and should be fairly applied.

It does not require that there should be no conflict in the evidence, for if so the complainant might be at the mercy of a false witness and the court might be helpless to grant its aid where thoroughly satisfied of the merits of the bill; but where, all the evidence being considered, the court entertains a certain conviction that the bill is true, it will decree accordingly, though there may be conflict upon material points in the case.

Even in criminal prosecutions, where life and liberty are involved, there may be a conviction if the jury are satisfied beyond a reasonable doubt, notwithstanding there is positive evidence contradicting that offered by the State. It is not understood that in cases like the present the measure of proof necessary to support a conviction in cases of felony, would be required. But there must be a higher decree of certainty than is to be had from the mere preponderance of the evidence—and as admitted by the authorities, it is difficult to state with accuracy just how much will suffice.

In every case, the chancellor, having in mind the general rule, will seek to apply it to the peculiar facts before him. After a careful reading of the evidence in this case we find that it is not free from conflict upon material points—yet there is such a state of the proof that the court, having the witnesses personally present, and enjoying that great advantage in weighing the testimony, which is impossible where the record only can be seen, may have been perfectly justified in reaching the conclusion that the bill was true. We are inclined to think such conclusion was correct according to the strict rule above stated.

It is purely a question of fact, and we are impressed with the belief that the decree is responsive to the merits of the case. It is unnecessary to set forth the evidence in detail or in general, or to notice the arguments of counsel. We have examined and considered it all and are satisfied with the decree.

Decree affirmed.

CHADDOCK COLLEGE
v.
HENRY BRETHERICK.

Master and Servant—Recovery of Wages.

1. Any person under contract, or other legal obligation to represent or act for another in a particular business, can not lawfully serve or acquire any private interest of his own in opposition to such business, during the continuance of the relations between them.
2. Whether the taking of private pupils by a professor of music in a college is in competition therewith, is a question of fact for the jury.
3. In an action brought to recover a balance due on account of salary, this court declines, in view of the evidence, to interfere with a verdict for the plaintiff.

[Opinion filed May 24, 1890.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. J. F. CARROTT, for appellant.

Messrs. H. M. SWOPE and CARTER, GOVERT & PAPE, for appellee.

PLEASANTS, P. J. Appellee brought this suit before a justice of the peace to recover \$127.30 claimed as the balance due on account of his salary as principal of the musical department of the college for the college year 1886-7. On appeal he obtained judgment upon a verdict for that amount.

It appears from the record that a noted musician and teacher of Chicago having recommended him as a suitable person for that position, the president of the college wrote to him to know if he could take it. In reply to his answer asking for some information, not shown. Mr. Bonnell, an agent of the college, in the absence of the president, wrote to him June 27, 1884, saying, "we want a principal for our musical department and one who will take hold of this city and impress it pro-

foundly, and who has an ambition to develop a musical department of college to the largest possible degree. There is a fine field in this city. * * * Will you accept the principalship of this department of Chaddock College from the receipts of that department for \$800 per year to begin with?" Appellee, by telegraph, inquired "How many teachers will be in that department, how many pupils last year, what are the terms, and is amount in letter guarantee that salary shall not be less but as much as total income from department may be?" Bonnell answered: "Three music teachers, fifty-one music pupils last year, \$15 per quarter instrumental and vocal culture. Guarantee five-sixths of total income from musical department." Appellee then telegraphed him July, 1884, "Will accept position at five-sixths of tuition, but \$800 must be guaranteed," and on the 3d Bonnell closed the contract by the following: "We guarantee you \$800. Will depend on you."

Under this contract appellee went to Quincy, took charge, as principal, of the musical department of the college, and held the position by re-engagement from year to year without change in the contract, for three college years, from September to June. The income from that department for the last year fell short of the amount guaranteed \$127.30, which appellant refused to pay.

No complaint is made of the manner in which he discharged the duties of his position, or of any neglect or failure as to any that were expected of him, except that he took private pupils and gave them instruction in music, first at his residence, and from November of the last year at rooms in the city which he rented and fitted for that purpose, from whom he received, for such instruction, more than the amount of the deficiency claimed. That was the only ground of the defense here set up. It is contended that in thus receiving private pupils, and especially in organizing a conservatory of music on his own account, as he did about the 1st of April, 1887, at the rooms referred to, he acted adversely to the interests of the college in the business or object for which it had engaged him, employing for his own individual benefit the

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Chaddock College v. Bretherick.

time, skill and labor therein which he was to receive for that of the college.

A trustee, agent, servant or employee, under a contract or other legal obligation to represent another in any particular business or line of any valuable purpose, must be loyal and faithful to such other in respect to such business. He can not lawfully serve or acquire any private interest in opposition to it. This is a rule of common honesty as well as of law. Davis v. Hamlin. Appellee violated it and made any profit therefrom to the college.

But whether he did or did not is a question to be determined by his contract and his acts.

The contract, and the whole of it, appears in the correspondence above quoted, from which it seems that on his part, to serve the college as principal of the music department, and on its part, to pay him as salary five-sixths of the income from that department, with the proviso, however, that it should be not less than \$800, and if that income should fall short of that sum, the whole of it and the college would make up the difference; and if it should be \$800 or more, he was to receive one-sixth and in case five-sixths of that income should be in excess, the amount of such excess in addition.

We do not see that he contracted to do any other than to charge the duties of principal of the music department of the college. It is true he was informed that it was the purpose of the college to have a man who would take hold of the department and profoundly impress it, and who had a high ambition to develop such a department. But the trustees of the college were satisfied by the recommendation of Mr. Eddy and thereupon, at their own election, that appellee was such a man. He did not contract to do the city profoundly nor to develop the department to the largest possible degree," but only to be and to act as principal, which was all they asked of him.

It is also true that upon receiving the dispatch of July 3d above quoted, he wrote to Mr. Bonnell, as follows :

"Your telegram accepting my proposition was received this morning, so that I shall at once make preparations to move, and have written Ripon, declining the position there. I hope we may be able to build up a good musical department and maintain a high standard. It will be my utmost endeavor to do this, and trust to be as successful as I have been heretofore."

From the beginning the defense seems to have proceeded upon the assumption from that letter that appellee agreed, absolutely, to "build up a good musical department," and by means, if necessary, other than the discharge of his duties as principal. We think this a mistake. The statements in that letter formed no part of the contract, or of the consideration for his employment. It was written after the contract was made and completed. It expressed only a hope and a purpose under that contract, but left the obligation just as it was before the letter was written, viz.: to perform the duties of principal. What these were, if any, beyond giving and directing the instruction in music to students, in that department of the college, were not prescribed by the contract, nor shown by proof of custom or otherwise. Certainly, the contract bound him to do what he reasonably could to build up and maintain a good musical department by the proper discharge of the duties pertaining to his position as principal. But we apprehend they did not obligate him to become a drummer for pupils, to find the students for the college as well as to instruct them. We are not able, from the law, the contract or the evidence, to indicate any positive duty beyond those mentioned, but may say, negatively, he could not rightfully do anything for his individual benefit that would materially interfere with his proper performance of those mentioned, or destroy or counteract the natural effect, in the interest of the college, of his proper performance of them.

It does not follow that he could do nothing directly for his own benefit as a professor of the science and art of music. Nobody would question his right to give a public concert,

and as a means of drawing an audience advertise himself in its announcement as principal of the music department of Chaddock College; thus using his relation to the college for his individual profit. So he might prepare, publish and sell an instruction book, though it presented substantially the same course of study and method of teaching pursued in the college, and its actual effect might be to prevent some from attending as college pupils. The obvious reason is that these acts would not be in opposition to the interest of the college or interfere with the discharge of any duty he owed it. For the same reason he might take private pupils and instruct them singly or in classes, at his residence or at rooms elsewhere, for the course of instruction might be preparatory to that given in the college, or pupils might be those only who would not in any event become pupils of the college. But they should not be taken in competition with the college. Whether the private pupils of appellee in this case were so taken was a question of fact for the jury.

It appears that the college hours for musical instruction were from 8 A. M. to 12:20 P. M., and that those given to the private pupils were later, extending to 10 P. M., so that there was no interference in respect to time; that the private pupils were generally clerks in stores, school teachers and married ladies, persons who could not or would not attend the college as pupils in music; and that the price of instruction to them was higher than that asked by the college. We infer from the evidence that the location of the conservatory, so called, though on Main street in the city, was quite remote from that of the college, but the distance is not given. Appellant had, or could easily have ascertained the name and residence of every one of these private pupils, and yet made no attempt to show that but for the establishment of the conservatory any one would have attended the college. It would clearly have been for the interest of appellee to have them all as college rather than conservatory pupils, since in that case he would have received at least five-sixths of the income from them and been able to instruct them with more convenience and at less expense to himself. And, hence, it is not unrea-

sonable to believe that the conservatory was organized, not with any intention of competing with the college, but to obtain remunerative employment for his wife, who also taught, as well as himself, for a large amount of time that would otherwise be unoccupied, by thus accommodating those who desired instruction but would not attend the college, and the jury may have found that the facts accorded with such intention.

Moreover, there was evidence clearly tending to prove that the trustees of the college had full knowledge, from the first year of appellee's service, that he was thus instructing pupils on his own sole account, of his opening of the rooms on Main street for that purpose and of his intention to organize the conservatory; and that they consented to it. As to their consent to the organization of the conservatory, that evidence was not uncontradicted. Some of the trustees testified that they did object unless it should be organized as an adjunct of the musical department of the college and the proceeds accounted for to their treasurer, or that they supposed it would be or was so organized. Still, on this point, there was at least a conflict, which was for the jury to decide. We deem it unnecessary to present the substance or outline of that testimony here; but will say that circumstances clearly supported the positive statement of appellee, and we would not feel warranted in disturbing a finding in his favor. If the college consented to them, then these acts would not be a legal injury to it, though otherwise they might have been.

Nor would it be useful to extend this opinion by a discussion of the points made on the rulings of the court below. The issue was one of fact, which has been thrice found for the plaintiff, and we perceive no such error as should reverse this judgment on the verdict.

Judgment affirmed.

OHIO & MISSISSIPPI RAILWAY CO.

v.

JOHN H. ROBB, ADM'OR

Railroads — Negligence — Personal Injuries — Assumption of Risk.

1. The negligence of fellow-servants is one of the defenses available to an employer in entering upon a given employment.

2. Two railroad engineers in the same grade of service over the same track, are, by reason of their ordinary negligence, looked upon as fellow-servants.

[Opinion filed May 24, 1890]

APPEAL from the Circuit Court of Shelby County.
Hon. JACOB FOUKE, Judge, presiding.

Messrs. POLLARD & WERNER, for appellants.

Mr. ANTHONY THORNTON, for appellee.

WALL, J. This was an action by the estate of Albert A. Kenney, deceased, against the railroad to recover damages for causing the death of the deceased. The judgment was for the plaintiff.

The deceased, Kenney, was an engineer on the Ohio & Mississippi Railroad and was killed in a collision caused by the negligence of the engineer of the other train, which was a "wild" train. Large was ordered to take the train from Springfield to Pana. The order given by the dispatcher was—"Run to Pana avoiding reverse." In violation of this order he left Taylorville on a regular train and thus caused the collision between there and the next station. He possessed the time card, but he persisted in his disobedience of the remonstrance of his fireman, who ordered him to stop, and he lost his own life in the result.

We are unable to attribute any fault to the train dispatcher. He gave a clear, explicit order easily understood, which, if obeyed by Large, would have insured the safe passage of both trains. True, he did not notify the deceased, Kenney, of the coming of the wild train, but if he had, no additional security would have been gained. Kenney would have known merely that the wild train was approaching, but under orders to keep out of his way, and would have had no reason to apprehend it would disregard orders and get on his time. Hence, the information would have suggested no extra caution on his part, and certainly it would not have justified him in giving up his own right of way, and therefore could have made no change in his action. He would and should have done precisely as he did.

Then if the master is liable, it is because he is responsible for the negligence of the delinquent servant, though the person injured was also a servant, and because such negligence was not one of the ordinary perils of the service, assumed by the injured servant. If this is so it must be for the reason that they were not fellow-servants, as it is a well settled rule of law that the negligence of fellow-servants is one of the hazards ordinarily incident to the employment and presumably anticipated and contracted for, and for which no liability attaches to the common master.

We are of the opinion that these two engineers were, by reason of their ordinary and usual duties, so habitually associated as to become fellow-servants within the rule as announced in the *Moranda* case in 93 Ill. 302.

While they were not engaged in the doing of one particular thing, yet they were in the same grade of service, each participating in one particular line of employment—that of running engines over the same track, and in the usual and ordinary course of the service their duties would bring them into habitual consociation in a position to be familiar with each other's mode of performing the same sort of duty, certainly exposed to peril by each other's negligence therein, and in a position where each might, and naturally would, from the strongest motives of self-preservation, seek to exercise an influence cautionary and corrective over the other.

Each one owed it to himself as well as to the public to observe and, as far as possible, correct any negligent habit or tendency in

We therefore hold the master not liable for negligence in question. The judgment will be affirmed.
Ju

Recital of facts found by the court:

And, having duly considered the premises, that the death of the plaintiff's intestate resulted from the negligence of Large, the engineer in charge of the wild train, which negligence occurred while the plaintiff's intestate was engaged in performing the service devolved upon him, on the behalf, as such engineer, and not by or for the negligence of any other person, and it is further found that at the time of said negligence the said intestate and the plaintiff's intestate were fellow-servants of the same railway company, wherefore the defendant is not liable to the plaintiff for such negligence.

INDIANAPOLIS & ST. LOUIS RAILWAY

v.

HARVEY H. ADAMS.

Railroads—Transportation Contract—Breach—Evidence—Instructions—Special Findings.

In an action against a railroad company to recover for breach of a contract on its part to carry certain live stock to a reasonable time, this court holds that an instruction claiming to define gross negligence, was properly refused. Of the evidence, the verdict for the plaintiff can not be

[Opinion filed May 24, 1890]

APPEAL from the Circuit Court of Edgar
C. B. SMITH, Judge, presiding.

Messrs. JOHN T. DYE and ROBERT L. MCKINLAY, for appellant.

Messrs. J. F. VAN VOORHEES and JAMES A. EADS, for appellee.

PLEASANTS, P. J. Appellee recovered judgment on a verdict for \$179.57, for alleged breach of contract by defendant, appellant, to transport for him two carloads—thirty-five head—of beef cattle from Paris, Illinois, to East Buffalo, New York, within a reasonable time.

The terms of the contract were agreed upon, and the cars ordered, on December 11, 1888, for the 14th, when it was signed. At noon of that day the cattle were brought by appellee to Paris, and there put in appellant's shipping pens, to go out by the 7 P. M. train. By the usual course of transportation they would arrive at East Buffalo at 6 A. M. on the 17th, which would be Monday, and was generally the best market day of the week. There were considerable delays in starting, and at Indianapolis, Cleveland, Ashtabula and Dunkirk. The delay of seven hours at Ashtabula was claimed to have been by reason of a flood that washed out a bridge; but except for preceding delays they would have passed that point before the bridge became dangerous, and it was further charged that they might have gone on upon another road from that point.

They arrived at East Buffalo on Tuesday, December 18th, at 3 o'clock P. M.—thirty-three hours behind time. Appellee claimed damages for fall in price, extra shrinkage, feed, yardage and other trouble.

It appeared that by the contract, which was in evidence, the plaintiff released the defendant and other carriers from all claim for damages by delay in transportation, etc., except such as should be proved to have been caused by their gross negligence.

The court gave to the jury its own instructions, refusing those asked. They were told that the release was lawful and valid, and that defendant was not liable for any delay unavoidably occasioned by the act of God, as a flood, or even by its

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own negligence, unless it was gross. We th
tions embraced all that was both material ar
asked.

They did not, however, define gross ne
definition asked was as follows: "By the te
gence, as used in these instructions, is meant
or omission wilfully and maliciously done
wantonly reckless conduct, showing an utter
rights of others." That put it too strongly
refused. If defendant deemed it important
cal definition given, it should have asked a co

Several others were asked, stating in subst
not responsible for delay through accident
though it was not the act of God or of the
and might have been prevented. We recall
any such accident or misfortune.

Special interrogatories were submitted.
whether plaintiff released defendant as abo
returned for answer, "No." This was eviden
some misunderstanding, error or inadvertenc
tract and its effect were admitted, and the cor
the instruction relating to it were before the
unimportant, since their answers to others
delays were not attributable to the act of Gc
accident, but to gross negligence of the defen

There was evidence sufficient to support th
appellee upon all the questions of fact in iss
findings except the one first above mentione
ceive no material error in any of the rulings

The judgment will therefore be affirmed.

Judge

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LAKE ERIE & WESTERN RAILROAD COMPANY

v.

RICHARD MORAIN.

Railroads—Negligence—Personal Injuries—Failure to Stop Reasonable Time—Jerk of Train—Evidence—Instructions—Special Interrogatories—Practice—Verdict.

1. A verdict is final where the evidence was conflicting unless errors of law intervened of such gravity as will require a reversal.

2. An instruction for plaintiff omitting the qualification that it was necessary that he should have exercised ordinary care, should not be given in an action for the recovery of damages for personal injuries alleged to have been occasioned by the negligence of another.

3. An instruction not based upon the facts should be refused.

4. Likewise an instruction setting forth that an assumed state of facts would bar a recovery.

5. Interrogatories calling for a finding upon mere evidentiary or probative facts, and not upon the ultimate facts upon which the case must be decided, should be refused.

6. In an action brought to recover from a railroad company for personal injuries alleged to have been occasioned through its negligence, this court holds that the erroneous giving of a defective instruction in behalf of the plaintiff was cured by the giving of others, that several instructions asked by the defendant were properly modified by the trial judge, and declines to interfere with the verdict for the plaintiff.

[Opinion filed May 24, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Messrs. A. E. DE MANGE, and W. E. HACKEDORN, for appellant.

Messrs. BENJAMIN & MORRISSEY, for appellee.

WALL, J. This was an action on the case by appellee against appellant to recover damages for injuries sustained while attempting to alight from a train. The plaintiff obtained a verdict and judgment thereon for \$5,000.

The principal question discussed in the brief is, whether the evidence sustains the verdict. The ground of negligence relied on is that the train did not stop long enough to enable the plaintiff to get off safely, and incidental to this that it started forward with a slight jerk, whereby the plaintiff, while attempting to alight, was thrown down and so injured that it was necessary to amputate his leg just above the ankle. The train had an unusual number of passengers because of a fair that day held at Saybrook, and two extra cars were provided for the occasion.

Analyzing the question of negligence as presented by the evidence, it will be seen that the chief inquiry was, how long did the train stop? did it stop the usual time? did it stop long enough to allow plaintiff a reasonable opportunity to alight?

To this distinct point both parties mainly directed their attention, realizing, no doubt, that it was vital, if not controlling, and there is hopeless conflict herein. The plaintiff, by his own testimony and that of other witnesses, made it appear quite plainly that the interval was too short, and that to this the injury was clearly attributable.

These witnesses, eight or nine of them, do not all testify in one groove nor to one set of facts, but each gives his or her experience and observation on the occasion, and it may be said that the mass of their testimony is harmonious in the main, and substantially sustains the plaintiff's allegation.

On the other hand there is a mass of testimony fully as great, and so far as shown by the record apparently as fair, reasonable and consistent, all tending to the opposite conclusion. Either array would amply support the side on which it appears, but when they are opposed there is a conflict which the verdict must conclusively settle, unless errors of law have intervened of such gravity, as, according to established rules, will require a reversal. We consider it not necessary to set out the evidence, and have, therefore, given this brief statement of the impression produced by a careful reading of it, as contained in the abstract.

The first instruction given for the plaintiff is faulty in

omitting the qualification that it was necessary that the plaintiff should have exercised ordinary care as a condition essential to recovery, and unless the defect is cured in other instructions, the error is fatal.

But it will be found that in the next instruction the qualification or condition is properly stated, and so it is in the sixth and in the second and third modified instructions given on behalf of the defendant. The jury by their answers to the second and fifth special interrogatories, distinctly find that by the use of ordinary care the passengers could not all alight safely, and in particular that plaintiff could not. We think it unreasonable to suppose that the imperfection in the first instruction misled the jury, and induced them to find for plaintiff, regardless of whether he used ordinary care. Unaccustomed as a jury may be to consider legal questions and to draw nice distinctions, and to apply legal rules to evidence, it is not probable that this important feature of the case was misunderstood. If they read all the instructions and reflected upon the significance of the special interrogatories in this respect, they could not have failed to comprehend the point.

They have indeed found specially that the plaintiff by the exercise of ordinary care could not have safely alighted, and so it affirmatively appears they considered the question. In the case of *Willard v. Swansen*, 126 Ill. 381, the plaintiff had obtained an instruction which was defective in the same respect as this one. The Supreme Court held it to be clearly deficient, but said that the error was not fatal, because in another instruction given for plaintiff the rule was well stated, as it was also in several instructions given for defendant, and so the court concluded it was incredible that the jury were misled on that branch of the law, and affirmed the judgment notwithstanding such error. We feel constrained to make the same disposition of the objection here presented.

The defendant offered to prove that the plaintiff had got out of the car at Arrowsmith, the preceding station, and remained on the platform until the train started, and then ran along and climbed on the moving train, but the court refused to admit the proof. On cross-examination, the plaintiff had

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denied that he was out of the car at that station was not a matter of such relevance as to make it a subject for contradictory evidence for impeachment, at least not necessarily so, nor would it be competent as primary evidence. If admitted as proof it would be for the purpose of showing that the defendant referred to, plaintiff was guilty of a species of folly, from which the jury would be asked to infer that he was doing the same thing when he was hurt.

In *P. & P. U. Ry. Co. v. Clayberg*, Admin'r, it was held that the trial court properly rejected the evidence offered by the defendant, that the deceased was guilty of jumping on moving trains, because, as was held, the proposed evidence was merely to raise an immaterial issue.

We regard the evidence here offered as purely speculative and tending to raise a collateral issue, and is therefore properly rejected, and when it is considered in this case it is really nothing substantial in the proof to show that plaintiff was so negligent when he was hurt, we are of opinion that the offered proof, even if admissible, could have no effect. It is complained that the court erred in modifying the instructions asked by the defendant. As to the first, so modified, the amendment is merely immaterial. As to the fourth, the alteration made no substantial change in meaning, but rendered it more clear and definite. As to the third, the change consisted in striking off the words "and any person so conducting," which was in substance a statement of the statute making it unlawful for any person or minor to do so, to climb, jump, step, stand on, or in any way attach himself to any car, or moving, and any person so conducting having no cause of action for injury thereby. There was nothing in the evidence on which such a theory could be predicated. It is true the defendant maintained the theory that plaintiff, after he had once started, continued to hold on to the car and ran along with it, but the non-liability of defendant

received in consequence of such supposed act of the plaintiff, was clearly presented in the fifth instruction given for defendant.

Hence, the court properly struck this clause out of the third instruction, and properly refused to give another instruction containing the same proposition in slightly different terms. The substance of the second refused is contained in the fourth as modified, and also in the eighth, which was given as asked.

The third refused was not based on the facts, and was properly refused for that reason. This was not the case of a train failing to stop at a station as suggested in the instruction, but of a train which made an insufficient stop, as alleged, not sufficient to enable a passenger, who was attempting to alight, to do so with safety. The fourth instruction refused was faulty in asserting non-liability, if the plaintiff remained on the car platform for fifteen seconds or any other period without attempting to get off until the train was in motion, thus in effect saying to the jury that the assumed facts constituted such want of care as would bar a recovery, which was a question for the determination of the jury, when all the facts in that connection were taken into account. It is also urged that there was error in refusing to submit to the jury the following questions:

3d. How long did defendant's train stop at Ellsworth?

4th. Did plaintiff alight from the platform of the car to the station platform, and then endeavor to regain the car platform or run along the station platform with the train?

7th. Did plaintiff, with his brother and the witness Vandervoort, stand on the platform of the car or elsewhere on the train after it had stopped at Ellsworth, without attempting to get off until it had started again?

8th. Did plaintiff receive his injury in attempting to get off the train while it was in motion?

9th. Did any of the trainmen consent to or encourage plaintiff's attempt to leave the train while it was in motion?

In *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, the Supreme Court construed the statutory provision requiring

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L. E. & W. R. R. Co. v. Morain.

the submission to the jury of interrogatories answered with regard to material questions in the case on trial, and it was held upon an consideration of the subject that the interrogatories submitted, must relate to the ultimate facts and evidentiary facts as might, more or less, tend to establish ultimate facts upon which the rights of the parties depend. The court there say:

“Not only does this conclusion follow from the rules relating to special verdicts, but it arises from the nature of the case.

“It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being so found, it would in no way aid the court in determining the facts to render.

“Doubtless a probative fact, from which the ultimate fact necessarily results, would be material, for the jury could infer such ultimate fact as a matter of fact. If the probative fact is merely *prima facie* evidence, to be proved, the proper deduction to be drawn from it is that the probative fact presents a question of fact, and not of law, and it therefore requires the further action of the jury, and it therefore cannot be the basis of any action of the court.

“Requiring the jury to find such probative facts as require them to find the evidence and not to find the facts results in nothing which can be of the slightest benefit to the parties or to the court, in arriving at the proper decision of the suit.” See, also, T. H. & I. Co. v. Voe.

Applying the rule thus stated to these interrogatories, it will be seen they were properly refused, since they are obnoxious to the objection that they call for the finding of mere evidentiary or probative facts, and not of ultimate facts upon which the case must be decided.

It is objected that plaintiff's counsel was negligent in leading questions to the witness, Vandervoort, and that matters much must be left to the discretion of the jury, and we see nothing in the action complained of that requires special notice. It can not be said the discretion was not duly exercised, to the prejudice of the defendant.

No other objections are presented in the argument of appellant. The judgment will be affirmed.

Judgment affirmed.

THOMAS SNELL

v.

JAMES DE LAND.

Partnership—Dissolution—Partition—Reference to Master—Exceptions—Evidence.

Upon a bill filed for the dissolution of an alleged partnership, for a partition and division of property on hand, and for an accounting, this court holds, in view of the evidence, which is conflicting, that the parties in question were partners, that there was an agreement between them for compensation to complainant for certain services, and that the decree in his favor can not be interfered with.

[Opinion filed May 24, 1890.]

APPEAL from the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. THOMAS F. TIPTON, for appellant.

Messrs. MOORE & WARNER, for appellee.

PLEASANTS, P. J. The bill herein filed by appellee on August 16, 1883, averred that about January 1, 1875, the parties entered into a copartnership for an indefinite time, for the purpose of buying, selling, improving, farming and leasing land, and doing a general trading business, by which they were to contribute equally in time, labor and money and share equally in profits and losses; that in pursuance thereof, they purchased certain lands described, in Shelby and De Witt counties, 123 mules, and other personal property, consisting of farming implements; that they have expended and received

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Snell v. De Land.

large sums of money in and from the business. Appellant has paid more and received less than defendant has paid less and received more than that they can not settle the affairs of the partnership between themselves. It prays for a dissolution and division of the property on hand and an accounting under the direction of the court.

William Metzger was also made a party defendant as a gagee of a portion of the land. He was disinterested and his interest was not affected by the decree, and he did not appeal.

The answer of appellant admitted the purchase of the property mentioned, and for the purpose of the bill, but denied that there was ever a partnership with it, or that he was indebted to the complainant on account of it or of any business growing out of it, and that he would account and settle with him of and concerning the same. He expressed his consent to a partition and division of the property, and to an accounting, as prayed by the bill. He filed a cross-bill, alleging a balance due him from the defendant and refusal of the complainant in the original bill to answer and asking affirmative relief.

Under orders entered by consent of the parties, the real estate, and also the mules and other personal property on hand were partitioned and divided, and the proceeds thereon apportioned between them, to their satisfaction. A special master, agreed on, was appointed to take the account and state the account, which is the only matter in controversy.

It appears that although during most of the time of the joint ownership the lands were farmed under the management of appellee, there had been no settlement of the account and while different items claimed on each side were set off, the sharpest conflict was upon the relations of the partnership bearing upon the character and extent of the partnership for the use of one-half of the lands, whether as a partner or partner, and his claim to compensation for his services in managing them. Appellant contended that

not a partner, and therefore was liable to him absolutely for the reasonable rental value of his half, without regard to the actual profits or receipts, and had no claim for services, nor for improvements which he had no right to make; and that if a partner, he had no right to compensation without an agreement therefor. Appellee contended that there was an express agreement for his reasonable compensation, and that, being a partner, he was accountable only for good faith in the management of them, and for net profits actually received. Thus the questions were, whether they were partners, and if so, whether there was an agreement between them for compensation to appellee for the services claimed.

The master disallowed the claim for such compensation, but did not find upon the question of partnership. His report contains two statements of the account. The one based on the assumption that they were partners, shows a balance due to the defendant, appellant, of \$56.03; the other, on the assumption that they were not, a balance due him of \$4,179.07.

To this report exceptions were filed by each of the parties, none of which were allowed by the master. It is said he declined to pass upon them, for the same reason that he declined to find upon the question of partnership, namely, that he was not by profession a lawyer. The court, however, found from the evidence reported that they were partners and that there was an agreement between them for compensation to appellee for the services mentioned. It was, therefore, ordered that his exception to the disallowance of his claim to such compensation be sustained and the report reformed in that particular, which was done; and on final hearing the report as amended was approved, and the court, further finding that \$630 was a reasonable allowance for the services shown, made a decree in his favor against appellant for \$573.97, being the amount so allowed less the balance of \$56.03 first reported against him. It is said this decree is erroneous on its face; that the \$630 is first found to be a reasonable charge against the firm, and then charged against appellant; but we think the language of the decree throughout shows it was a finding as between the partners and not as

against the firm, and that if appellee was entitled on that ground the amount so allowed was correct.

Counsel insists that the master's report is not an account in any proper sense, in that it fails to state what items were allowed and what not; that it is a recitation of a very few, specifically referred to, in the bills of particulars of the respective parties; that the balance by simple subtraction of the lesser from the greater, and is not a compliance with the rule declared in *Gage v. Ardt*, 121 Ill. 491, and *Overton v. Overton*.

This is true of the body of the report. However, that by order of the court, the parties presented to the master an itemized statement of their respective accounts, showing the debits and credits. Appellee presented three—the mule account, the land account, and the De Witt county land account, designated respectively as Exhibits "C" "B" and "A." Appellant one, designated as his Exhibit "A." These are referred to in the body of the report by the designations, as indicating what he allowed, and are mentioned as deducted or disallowed. They appear in the record in connection with the report, or elsewhere. At the last term, the production of the exhibits was suggested as a diminution of the cause was continued in order to have the motion of appellee, supported by affidavits of the master, showing that they were filed with the report and as part of it, and became lost. The files were in the hands of persons employed to make out the transcript of the record. They were not supplied, and the reason as stated by counsel is, that they were unable to find them, or to get them in time for this term. They claim that with the report as part of it, the report of the master would have been sent to the court below, every item allowed and disallowed.

The objection now made to it was not made at the exceptions filed below, and it is clear from the

that counsel had no difficulty in ascertaining what the master allowed and what he disallowed. In *Craig v. McKinney*, 72 Ill. 314, the court say: "The items of the account should in some way appear. When the master reports upon accounts, he generally states the results of the accounts in the body of the report, and refers to schedules as to particular items." Citing 2 Dan. Ch. Pl. & Pr., 1302; and although without these exhibits it is impracticable for this court to ascertain the particular items allowed and disallowed, we can not say it is the fault of the report or chargeable to appellee. Nor do we mean to imply that it is the fault of appellant or of his counsel. It seems to have been an accident which often happens to papers filed, and which nobody can explain.

The record in this case contains very nearly if not quite, six hundred pages of evidence, consisting almost wholly of the testimony of the parties themselves, called and recalled, again and again. It relates to a great number of transactions, and upon a very slight examination (for we have not undertaken a thorough one) appears to be by no means harmonious in respect to many of them. It further appears that the transcript was made with less of care than should have been given to it, if it had been practicable. Its magnitude, and the time allowed for its preparation must account for this. And the abstract, containing eighty pages, was evidently prepared under conditions still more unfavorable. For these reasons we have been unable to get such an understanding of the evidence as we desire in every case, and are compelled to dispose of it largely upon legal presumption in favor of the decree on findings of fact upon conflicting evidence.

Decree affirmed.

MARION DAVIS

V.

MIRIAM DAVIS.

*Divorce—Impotency of Wife—Alimony Pendente Lite—Solicitor's Fees
—Practice—Discretion of Trial Judge.*

Upon a bill filed for a divorce upon the ground of the alleged impotency of the wife, this court declines to interfere with an order that complainant pay, by a day named, a certain sum to defendant's solicitor.

[Opinion filed May 24, 1890.]

IN ERROR to the Circuit Court of McLean County; the
HON. OWEN T. REEVES, Judge, presiding.

Mr. FRANK R. HENDERSON, for plaintiff in error.

Mr. JOHN T. LILLARD, for defendant in error.

PLEASANTS, P. J. The record shows that these parties were married on October 21, 1880, in the State of Indiana, where the defendant in error still resides. On the 6th of August, 1888, plaintiff filed the bill herein for divorce, alleging that at the time of said marriage she was and still is naturally and incurably impotent, a copy of which, with notice of the pendency of the suit, was served upon her pursuant to the statute. On the 11th of September, 1888, she filed her answer, denying the charge; and on the 17th of the same month her petition for alimony *pendente lite* and an allowance for solicitors' fees and other costs and expenses of her defense. This petition, sworn to, states that she is wholly without means of support or of making her defense in a foreign State, and that complainant is a robust man, well able to earn and does earn enough to furnish her with the means necessary therefor. To which he answered, under oath, that she has a comfortable home with her father, who is able and willing to sup-

port her, and is also able to furnish her all means necessary for defending this suit, but refuses to do so, because she has no just ground of defense; that respondent left to her all "their household property," worth \$400, and what other property he had after paying his debts there, amounting to \$100, in consideration of which she released him from all claim for alimony; that he has no property of any kind; that since he came to this State he has worked out as a farm hand when his health permitted, and that it has taken all he could earn to support and care for himself and to pay his necessary expenses and the debts he owed. She then filed a further affidavit, reaffirming the statements of fact in her answer and petition, and adding that the defect she has is curable, as she is informed by her physician; that she has engaged him to operate upon and cure the same, and will, in a very short time, be entirely cured; that her husband lived with her seven years after the marriage, and that she would have been long since cured if he had aided her to get proper treatment or she had been able to pay for it.

It was stipulated that the court might decide the question of her allowance upon the pleadings, including the replication and the affidavits mentioned, without other evidence; and, thereupon, after argument heard, an order was entered that complainant pay to defendant's solicitor \$25, by a day specified. To reverse that order he prosecuted this writ of error.

On this petition the merits of the principal case were not in issue, and the allowance in question was largely in the discretion of the court. *Foss v. Foss*, 100 Ill. 576, and cases there cited; *Burgess v. Burgess*, 25 Ill. App. 526; *Becker v. Becker*, 15 Id. 247. Unless that discretion is very clearly shown to have been abused, its exercise will not be interfered with. *Ibid*.

It was incumbent on the petitioner to make a reasonable showing of her need and of his ability to respond to it. She did not institute the suit, but was made defendant by her husband, who had left her more than a year before, in another State, where he married her, and where, it will be presumed, the cause alleged was as sufficient as it is here. She made a

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prima facie case, at least for an allowance for account of solicitors' fees and costs and expenses of her defense. His own answer shows that though she is comfortably supported, she depends upon her father for it, and that he refuses to furnish her the means required to meet these expenses. Her need is thus admitted, unless the claim is sufficiently met and overcome by his statement of what he left her. That does not show that the "household property" referred to or any part of it was ever his, nor of what it consisted, nor what, if any of it is still under her control. For aught he says her father may have furnished a considerable part, if not the whole of it. She may have returned it to him in consideration of the support she receives. Its value is probably not under-estimated. Household property of persons in their apparent condition, after seven years use, would bring but little of its cost. It may be as necessary to her as are the means of defending this suit, and equity in that case would not require her to dispose of it in order to procure them. So of the other property, which he estimates at \$100. More than a year had elapsed since she got it. What it was, whether it was convertible, what occasion she had to consume it or otherwise dispose of it—these are matters that do not appear. If it be said it was for her to make them appear, we consider who brought the suit, and where, her remoteness from her counsel and probable lack of advice as to what was necessary or proper for her to show, more than she has shown. As to some of these matters he was fully as able as she to inform the court, and under the circumstances it did not become him to rely on implication from his own silence, merely to shift the burden of proof, leaving the court still ignorant of material facts which he might have disclosed. We can not clearly disprove of the finding from the evidence that she really had need of some allowance.

It does not appear that he is able to pay much. Nor was he ordered to pay much. Nothing was allowed for alimony *pendente lite* or other expenses or costs, but only a trifling amount for solicitors' fees. If he is able to prosecute the suit and this writ of error at his own expense, he could not well

deny, nor does he in fact deny his ability to pay this amount.

The jurat to the petition and additional affidavit of the defendant purports to be signed by a justice of the peace of Jay county, Indiana, and counsel insist, because his official character is not further shown, that notwithstanding it was stipulated that these might be considered by the court on the hearing of the petition, they are not entitled to be received as evidence. The point does not appear to have been made below, and if it had been, we think it should have been overruled under the stipulation.

It is further claimed that the petition in the case is a cross-bill; and that inasmuch as it does not waive the oath to the answer, and the answer is made under oath, and no formal replication thereto was filed, the answer must be taken as true. No authority is cited in support of this proposition, and we apprehend none can be. In fact, however, the additional affidavit, or whatever it may be called, was filed after the answer to the petition, and it re-affirms the averment of the petition as well as of her answer to the bill. That might do for a replication, if one in form were required. With reference to this petition, we regard all these papers, including the pleadings in the principal case, as affidavits in evidence in support of, and opposition to the petition or motion for the allowance.

The circumstances of this case are in no particular like those in *Wheeler v. Wheeler*, 18 Ill. App. 330. There is here at least some showing in favor of the defendant in error upon all the points required to justify the order made, and we see in that order no abuse of discretion.

Order affirmed.

CITY OF BLOOMINGTON

v.

HUGH MURNIN.

Nuisance—Sewer—Municipal Corporation.

In an action brought for the recovery of damages for injury suffered by reason of the stench arising from a sewer, this court declines, in view of the evidence, to interfere in favor of the plaintiff.

[Opinion filed May 24, 1891.]

APPEAL from the Circuit Court of McLean County,
Hon. A. SAMPLE, Judge, presiding.

Mr. A. E. DE MANGE, for appellant.

Messrs. F. R. HENDERSON and T. C. KENDRICK, for appellee.

PLEASANTS, P. J. The declaration in this case states that the city so wrongfully built a sewer, as by the stench arising from it, and the matter thereby carried, accumulated and left in the yards and residence of plaintiff, appellee, to depreciate their value and injure him in respect to his property. The trial, upon the issue of not guilty, resulted in a verdict and judgment in his favor for \$400 damages. There is little in the record but questions of fact, as to whether or not that can be fairly claimed on behalf of appellee, the evidence was conflicting.

Appellee owned a corner lot in the north-west corner of the block on which he had his family residence, fronting on North Main avenue, and a tenant house fronting north on North Main. The structure complained of is an extension of the main sewer, made some time in 1888, of a main sewer, then occupied for its shops by the Chicago & North Western, and about four hundred and fifty feet further north.

on Aqueduct street about sixty feet from appellee's residence, where it discharges into an open ditch or creek. East of the railroad grounds the sewer is four feet in diameter, inside, through those grounds six, and thence on to the outlet five. Fourteen or fifteen hundred men are employed in the railroad shops, and their water closets are all connected with the sewer. The large quantities of cotton waste, used in cleaning the machinery, also go into it. It appears that before this extension was built, two of the shop privies were built over this ditch or creek, but the others had vaults in the earth and were not drained by it. Some witnesses testified that the stench near appellee's residence was about as bad before as since the sewer was extended, so far as they have observed, but we think the clear weight of the testimony is to the contrary. The appellee and others, having better opportunities to know, say they suffered little or no annoyance before, while since then it has been very great.

The city engineer testified that the sewer was properly constructed, but did not deny what many others stated, that the bottom of it at the outlet is a foot or more lower than the bottom of the ditch. Inevitably the effect of this depression would be, when but little water was flowing there, to arrest the passage of solid matter at and about the outlet. And such was shown to be the fact. It was from the accumulations there in a dry time that the stench complained of arose. To appellee it was shown to be a very serious annoyance, and to his property a considerable injury, making the tenant house hard to rent and his residence unsalable, according to the testimony of many witnesses.

By answers to special interrogatories, the jury found that the sewer was improperly constructed and improperly used by the city, and that the city thereby "caused a direct physical obstruction or injury to the right of user or enjoyment of the property of plaintiff described in the declaration, by which said plaintiff has suffered special, pecuniary damage in excess of that sustained by the public generally." The facts thus found make a good cause of action. *Rigney v. City of Chicago*, 102 Ill. 64; *City of Champaign v. Forrester*, 29 Ill. App. 117.

There was evidence in support of all the opinion of the city engineer that the sewer constructed, was certainly not conclusive against actual condition and the actual effect of such it was for the jury to find the fact, from bearing upon it. There can be no doubt and acquiesced in the use made of the sewer R. R. Co. and the employees at its shop offensive gases are matter, though not solid physical obstruction or injury to appellee's found. The errors charged to the court, if were too mild to do harm or require notice

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THE PEOPLE, FOR USE, I

v.

JOHN S. LANE.

Administration—Bond—Debt—Pleading—Sufficiency

1. A declaration is sufficient in law, if it properly states the legal presumptions arising thereon, make a presumption then incumbent on the defendant, by pleading, to the material fact so averred, or some material presumption come, stands for a fact; and upon proof of the facts and evidence, the presumption arising or the fact averred.

2. It is enough, in an action upon the judgment, to aver its judgment without setting forth the jurisdiction.

3. In an action of debt upon an administrator's bond, that he had failed to perform his duty in accordance with the terms thereof, in not obeying an order of court to pay funds out of the estate *de bonis non*, this court holds that the County of all the matters in respect to which its action was sustained, and that the sustaining by the trial court of the declaration was improper.

[Opinion filed May 24, 1891]

APPEAL from the Circuit Court of Calhoun County; the Hon. G. W. HERDMAN, Judge, presiding.

MESSRS. T. J. SELBY and E. A. PINERO, for appellant.

MR. JOSEPH S. CARR, for appellee.

PLEASANTS, P. J. Debt on an administrator's bond, brought by the administrator *de bonis non* of the same estate against one of the sureties, the principal and one of the sureties being averred to be non-residents of the State, and the other two sureties dead. Judgment below was for the defendant, on demurrer to the declaration which averred in substance as follows: That Absalom R. Whitaker was, by the County Court of Calhoun County, on the 15th day of June, 1872, at its June term 1872, appointed administrator of the estate of William S. Whitaker, deceased, and thereupon, with sureties named, including the defendant, executed the bond sued on, which, with its condition, is set out in its legal effect so fully that it appears to be in the form prescribed by the statute, and entered upon the administration; that he continued to be such administrator until the 18th day of November, 1873, when by the order of said court his letters were revoked and he was ordered to pay all moneys and deliver over all papers and valuable things of the said estate to the new administrator thereof; that afterward, to wit, on, etc., at, etc., he delivered over to Henry C. Withers, his successor in office, as administrator *de bonis non* of said estate, all the assets belonging to said estate then remaining in his hands, except the moneys in his hands, amounting to the sum of \$2,357.26; that said Withers was then and there duly appointed administrator *de bonis non* of said estate by said County Court, and duly qualified as such, and continued to be such until the 7th day of November, 1887, when he was by the order of said County Court discharged; that on the 20th day of December, 1887, the said James N. Kelley was by the order of said County Court duly appointed administrator *de bonis non* of said estate and then and there duly qualified as such, and is now the duly qualified and acting administrator *de bonis non* of said estate;

that said Absalom R. Whitaker has not faithfully discharged the duties of his said office of administrator according to the condition of said bond, but has neglected and refused so to do, to the injury of said Kelley, as such administrator *de bonis non*.

And for assigning a breach of said condition, it avers that at the January term, A. D. 1874, of said County Court, to wit, on the 20th day of January, A. D. 1874, at said county of Calhoun, the said Absalom R. Whitaker, as such administrator, on consideration of his accounts and reports, by the judgment and consideration of said court, was then and there ordered and directed to pay over immediately to Henry C. Withers, administrator *de bonis non* of said estate, the said sum of \$2,357.26, and, though requested, then and there refused so to do, and has not paid the same to said Withers nor to said James N. Kelley, his successor in office as such administrator *de bonis non*. By means whereof said bond has become forfeited and an action has accrued, etc.; yet the said defendant, though requested, has not paid, etc., and concludes with profert of the letters to said Kelley.

The causes assigned for the demurrer were:

1. That it does not appear by said declaration that said Absalom R. Whitaker was ever notified that his official bond was deemed insufficient, or that any order was made requiring him to give an additional bond or sureties.
2. Nor that his letters were ever lawfully revoked.
3. Nor that he has at any time refused or neglected to obey any order of said County Court lawfully made.
4. Nor that any demand was ever made upon him for the payment of the moneys alleged to be in his hands.
5. That the alleged order revoking his letters was void.

The position taken in behalf of appellee, is that "it was not sufficient to aver generally that a certain court rendered a certain judgment, but on the contrary, that proper pleading required that the facts necessary to show the court named had jurisdiction of the parties as well as the subject-matter should be stated."

In support of which the cases of *Munroe v. The People*,

102 Ill. 406, and Hanifan v. Needles, 108 Ill. 407, are cited, in each of which the court was considering and speaking of the evidence, and not at all of the sufficiency of the pleading. Nobody doubts that if the evidence shows the court had not jurisdiction of the person or subject-matter, its judgment would be void. But that would be no less true where the declaration averred facts sufficient to show such jurisdiction. These cases, then, have no bearing upon the question here presented.

We apprehend a declaration is sufficient in law, if it properly avers facts which, with the legal presumptions arising thereon, make a *prima facie* case. It is then incumbent on the defendant, by pleading, to traverse or avoid some material fact so averred, or some material presumption, which, until overcome, stands for a fact; and upon proof of the facts alone, to overcome by evidence, the presumption arising or the fact averred.

The statute gives the County Court jurisdiction of all the matters in respect to which its action was here averred. It may issue and revoke letters of administration, and discharge administrators. It has the power in every such case to determine whether it has jurisdiction of the person and subject-matter, and what is the proper action to be taken. As to these matters, it is a superior court. Propst v. Meadows, 13 Ill. 157; Housh v. The People, 26 Ill. 178; Bostwick v. Skinner, 80 Ill. 147; Matthews v. Hoff, 113 Ill. 96.

And as to such courts, nothing will be intended to be out of their jurisdiction. "If it is possible for the courts to have jurisdiction, it will be presumed the state of facts existed which authorized it to assume to render judgment," said the Supreme Court in Wallace v. Cox, 71 Ill. 548. Hence it is sufficient, in an action upon the judgment of a superior court, to aver its judgment without setting forth the jurisdictional facts. See the form of the court in 2 Greenl. on Ev., Sec. 279, note.

So here, it was not legally impossible, as is asserted, to discharge Withers and then appoint Kelley as administrator *de bonis non*, nor is such the effect of the holding in Blanchard v. Williamson, 70 Ill. 647. It will be presumed, until the

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Doyle v. School Directors.

contrary appears, that Withers complicit requirement of Sec. 40 of Chap. 3, R. S. County Court had express power to do also, as to facts necessary to authorize the proceedings of the court averred in the demurrer.

For these reasons we think the demurrer overruled. The judgment will, therefore, be reversed, and the cause remanded for further proceedings.

Reverse

GEORGE W. DOYLE

V.

SCHOOL DIRECTORS, ET AL.

Master and Servant—School Teacher—Wrongful Discharge—Wages—Other Employment—Evidence—Incompetency

1. In an action brought by a discharged school teacher to recover an amount claimed to be due as salary, it is improper as a matter of law to require him upon cross-examination to answer questions which tend to show that after his employment a remonstrance was issued in the district, and signed by diverse persons.
2. Evidence going to show that the plaintiff had received the amount due him, is not admissible as bearing upon the issue of competency.
3. The neglect or refusal of parents to send their child to school can not, of itself, affect the right of the teacher to recover in accordance with the terms of his contract.
4. A certificate of qualification from a county board is *prima facie* evidence of capacity to teach, and though impeached by proof of incompetency, it can not be impeached by a teacher for salary due, nor will it be invalid as to the introduction of testimony going to show that for the time being he was not in fact examined.
5. There need be no second examination of a teacher when he presents a renewal certificate, the original certificate issued by the board having expired by statutory limitation.
6. An instruction in such case imposing upon the plaintiff the burden of proving that he had tried and failed to get other employment is erroneous.

7. Where other employment is obtained and wages amounting to as much as could be recovered under the first contract are earned, nominal damages may be recovered, in case of a breach upon the employer's part.

[Opinion filed May 24, 1890.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. J. J. PHILLIPS, Judge, presiding.

Mr. JAMES M. TRUITT, for appellant.

Messrs. GEORGE PEPPERDINE and LANE & COOPER, for appellee.

PLEASANTS, P. J. Appellant was employed by appellees to teach their district school for a term of five months commencing on the first Monday of October, 1888, at \$30 per month. On Saturday of the first week of the term, a majority of the directors determined to discharge him "for the good of the school." On the following Monday morning they went to the school-house and told him they had come to dismiss him for the good of the school, and asked him to resign. He refused, unless they would pay him the full amount of \$150. This they declined, and after some further conversation he said he would take his dismissal if they made out, signed and delivered to him a writing stating that by the action of the board of directors he was discharged as teacher of that district, but assigning no cause for it. Thereupon he gave them the register and left the school-house, but told them there would be trouble about it. He was paid for only one week's service, and this suit was brought to recover the balance. The verdict and judgment were against him and he appealed. We find in the record no evidence sufficient to support this verdict, and think it should have been set aside.

An attempt was made to show he was incompetent to teach, first, by cross-examination of the plaintiff himself, to whom, for that purpose, such questions were put as the following:

"What would $3\frac{1}{4}$ pounds of butter cost at $11\frac{1}{2}$ cents a pound? How to divide a fraction by a fraction?" Also by proving

THIRD DISTRICT—NOVEMBER

Doyle v. School Directors

that after he was employed, a remonstrance to the district and signed by divers persons properly excluded by the court.

It was shown that but a few pupils attended the week he taught, and that he knew of his appointment and that his appointment was discussed and questioned, though no objection of anything done or omitted by him during the term. But what pertinent issue in the case? The directors had in fact he had entered upon the performance of the contract and was ready and offered to go on in neglect or refusal of parents to send their children could not, of itself, affect his right to continue to the contract. He had taught for three weeks in that district. He had and produced his qualification from the county superintendent was *prima facie* evidence of his qualification. It might be overcome by proof of incompetency. He was not impeached in this suit, nor was it improperly allowed to be shown, that for want of a certificate he was not in fact examined by the county superintendent. *Union School Dist. v. Sterricker*, 8 Mich. 400. It appeared that the superintendent had examined him, and thereupon given him a certificate within the limitation fixed by the statute, before the issue here in question. This one being in fact a certificate, duty did not require another examination.

We think it was improper to admit payment of plaintiff or otherwise, that he had received the amount that would be due him, under the statute, within six days. There was no legitimate evidence of incompetency, nor was any attempt made to show cause for his discharge.

In the next place it was claimed that he was discharged or voluntarily resigned. The evidence disproves a resignation, and it is manifest that he was sent to be discharged. If he consented,

form resign, instead of demanding written evidence that he was discharged? Before he made the demand he had been informed by the directors that they had determined and were still determined to discharge him, without regard to his consent, and one of the directors testified that he thought plaintiff told them, when he received the writing, there would be trouble about it, and one, that when the other suggested the statement of the cause of discharge, he, the witness replied: "I guess not; that will come up if we have any trouble." They were not without apprehension of trouble, as they would have been if plaintiff had consented or they had so understood him. They had trouble. The county superintendent went to see them about it, but was not allowed to tell what they said to him, if anything, about plaintiff's consenting.

It is clear to our minds that he demanded the discharge in writing as evidence that he had not abandoned the position nor voluntarily resigned it. Perhaps the court was bound to recognize this defense in the instructions, but we think there was not evidence enough to support a finding of consent.

The defendant was allowed, over objection, to show what farm labor was worth at that time in that neighborhood; but no evidence was offered to show that plaintiff earned or received anything for such labor during the school term, or that he found or was offered employment of any kind during that time. And one of the instructions given for the defendant seems to have imposed upon plaintiff the burden of proving that he had tried and failed to get other employment. This was error. *Fuller v. Little*, 61 Ill. 21. And if he had got it and received therefrom as much as he would have received under the contract with defendants, still if there had been a breach of that contract on their part he would have been entitled to a verdict and judgment for nominal damages. *Williams v. Chicago Coal Company*, 60 Ill. 149.

For the errors indicated and because the verdict was against the evidence, the judgment will be reversed and the cause remanded.

Reversed and remanded.

RICHARD McLEAN

v.

C. A. WILSON, BY NEXT FRIEND

Infancy—Wager—Deposit with Stake-holder—No

1. A stake-holder of money bet upon a game or other matter, is regarded as the depositary of the respective parties, notwithstanding the illegal nature of their contract and he may pay the money unless previously notified not to do so.

2. While an infant may repudiate his action in depositing money with a stake-holder, he may not do so known and after instructing the winner to take his money from the stake-holder after the same has been paid over.

[Opinion filed May 24, 1890]

APPEAL from the County Court of Monroe, Louisiana, by the Hon. AMOS MILLER, Judge, presiding.

Messrs. T. M. JETT and J. M. TRUITT, for

Messrs. LANE & COOPER and WILLIAM B. COOPER

Per Curiam. Appellee sued appellant for money deposited with the latter as a stake-holder in a game of base-ball.

Appellee was a minor, and on this ground claimed his right to his money, though it had been paid to the winner. He also claimed to recover it on the ground that before the result of the game was known he notified the stake-holder not to pay. The court held that such notice was given, and further, he asserted that he alleged notice the appellee told the winner to pay the money, and that appellant, after being informed of the direction, paid the money over.

The trial court instructed the jury that the plaintiff enabled him to repudiate the entire contract and refused to permit the defendant to prove the direction of the plaintiff to the winner.

money, and refused to instruct the jury that plaintiff would be bound by such direction.

It appeared that plaintiff, while nearly of age, had a more mature appearance than his years would ordinarily indicate, and that he had been for some time engaged in business on his own account, and was supposed to be of age by the stakeholder.

A stakeholder of money bet upon a game or other matter of chance, is regarded as the depositary of the respective parties and is not affected by the illegal nature of their contract. *Doxey v. Miller*, 2 Ill. App. 30.

Hence he may lawfully pay the money over to the winner unless previously notified not to do so. He is authorized by the owner of the property to deliver it upon a contingency.

Regarding the subject in the light of the infant's want of power to confer such authority upon another in respect to his property, there is confessedly some difficulty, but we are inclined to think it is within the principle laid down in *Welsh v. Welsh*, 103 Mass. 562, where it was held that money belonging to an infant and received from him by his brother with directions to use for the benefit of their parents if necessary, and which was so used by the brother before revocation, could not be recovered by the infant from the brother. The court placed non-liability upon the ground that there was an executed agency and likened the case to that where an infant indorses a note payable to his order to a third person, and the maker pays it to the indorser, where the infant is bound by the payment, because the transaction has been executed in favor of the appointee and can not be opened without reinstating the maker; citing *Nightingale v. Withington*, 15 Mass. 272, where it was said by Parker, C. J., "It would be absurd to allow one who had made a promise to pay money to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise."

Conceding the position that an infant may repudiate his action in making a bet and in depositing money with the stakeholder, which is certainly correct, it would be an act of fraud upon the part of the infant, under the circumstances

Delisle v. City of Danville.

in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

Jacobs' Law Dictionary: Hawkers, peddlers and petty chapmen, are such persons as travel from town to town with goods and merchandise. The term "hawkers" seems to grow from their uncertain wandering, like persons with hawks seek their game where they can find it.

From these definitions we gather that, to constitute a peddler, three elements are essential: 1st. Itinerancy. 2d. A carrying of the goods with him for sale. 3d. A selling or an offering for sale.

A resident of a place, selling goods in that place, though he go from house to house, is not an itinerant. The traveling contemplated by the above definitions is a traveling or roving from town to town. The word peddler conveys the idea of a roving, unsettled person—one whose business has no fixed *situs*. Every definition given above, and every definition we have been able to find, carries with it the idea of the persons carrying his goods with him. And there must be a sale or an offering to sell. In 24 Ill. App. 340, *City of Elgin v. Picard*, the Appellate Court say that soliciting orders is not a selling or offering for sale. And, further, it seems to us that to put the construction on these facts that they constitute peddling, is against public policy. It is well known that retail grocers and other merchants everywhere send out a clerk to take orders and to wait upon customers at their homes. It is an unreasonable regulation that they should not be allowed to do this without taking out a license. Such a regulation ought to be held void as in restraint of trade. It is a regulation for which no necessity exists. It is virtually a tax imposed on enterprise.

The purpose of creating the power given to cities is twofold. First, to prevent nuisances; second, to raise revenue. This case calls for no exercise of this power on either ground. The act complained of is not a nuisance. The defendant is a *bona fide* resident merchant, and his goods are in a store room, subject to taxation as all other personal property in said city. The Supreme Court of Iowa have decided exactly this same

question in a case where the power in the ordinance were the same as in this case the opinion, says: "The establishment of the defendant had its operators where its goods were sold, and where they actually were sold, and where orders for goods by sample was in the City of Davenport v. Rice, 39 N. W. Rep. 287; of Spencer v. Whiting, 68 Iowa, 678; 28 N. W. Rep. 287; of Com. v. Farnum, 114 Mass. 267.

In Rex v. McKnight, 10 Barn. & Cres. 104, it was held that one who took orders for tea, and substituted goods for them, was not guilty of a "carrying to sea" in violation of the English statute. Reported in Com. Law Rep. p. 310.

In the City of Elgin v. Picard, the ordinance was held against "soliciting."

The defendant in that case solicited orders for various measures, etc., exhibiting a sample for the same. He lived in Chicago. The court there say that taking orders is not equivalent to selling, offering or exchanging any goods, wares, merchandise or articles of value. City of Elgin v. Picard, 100 Ill. 58.

In City of Chicago v. Bartee, 100 Ill. 58, it was held that a person selling milk from house to house is a peddler. This opinion was rendered by the court, and it was not clear whether in that case it was raised that the defendant was a bona fide resident of Chicago. However, in that case, the defendant was selling his goods about with him for sale. In which case it was held very materially from the case at bar.

We hold that the soliciting of orders by a bona fide resident merchant, is not a violation of the ordinance, and that the facts in this case do not show that the defendant has been a peddler, and that therefore he was not in violation of the city ordinance.

Mr. GEORGE G. MABIN, for appellee.

Per Curiam. This cause of action was

appellant for violation of Sec. 1 of Chap. 24 of the Revised Ordinances of the city of Danville, entitled "Peddlers," in words and figures following, to-wit: "Section 1. The selling of goods, wares, merchandise or other articles, or offering of the same for sale by any person transiently or temporarily in the city for the purpose of selling or disposing of the same at retail, whether in any room or building as a temporary place of business or at any stand, uninclosed place, or other place of any kind, and the selling of goods, wares, merchandise or other articles of value or the offering of the same for sale at retail, or the soliciting the sale of any book or other article by sample or otherwise, for future delivery, at retail, by any person traveling or going about from place to place within the city, on foot or in a vehicle of any kind, or whether such person resides or does business within said city or not, shall be deemed peddling, and the person so engaged in such selling or offering to sell as aforesaid, shall be deemed a peddler, and subject to the provisions of this chapter.

"Section 2. Whoever shall peddle or attempt to peddle goods, wares, merchandise or other articles of value without first obtaining a peddler's license, shall be fined not less than \$5 nor more than \$100, for each offense."

It is admitted that appellant, by his agent, James M. Shelby, went from house to house soliciting and taking orders for the goods of appellant in his store, and afterward delivered said goods by said agent, within said city; that neither the appellant nor his agent had a license or permit to solicit or take orders in said city, under this ordinance; and upon the above state of facts appellant was fined, and brings the case here for review.

We are of opinion that the ordinance under which appellant was convicted was broad and more extensive than the city council had power to pass.

We had occasion in the case of Sampson B. Rawlings v. The Village of Cerro Gordo, 32 Ill. App. 215, to express our views at length upon this question, and it is therefore unnecessary to repeat them. See, also, Emmons v. City of Lewistown, filed March 31, 1890.

The judgment of the court will be reversed.

Judgment reversed.

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ACCOUNTS—See LIMITATIONS, 7.

ACTIONS—See MUNICIPAL CORPORATIONS, 19.

ADMINISTRATION—See JURISDICTION, 2.

1. An administrator, who has included in from himself which he claims he is not liable to self credit therefor and have his liability tried on exceptions to his report. *May v. Leighty*,

2. The proper mode of procedure is for administrator *pro tem.* to bring suit on the final judgment. *Id.*,

3. The heir at law may, by tendering to deprive a creditor of his statutory right to be a *Culley v. Mohlenbrock*,

4. In an action against an executor for service during her sickness, this court declines to interfere. *Higgins v. Spring*,

5. An action against an executor for service who died before the expiration of the time limitation thereof, may be commenced after expiration year after the issuing of letters testamentary.

6. While a claim against an estate is pending improper to order money paid out to the legatees

7. Whether such a claim is *bona fide* can be determined laterally on petition of a legatee for distribution

8. An order of distribution directing the executor to pay to the legatees an equal portion of the cash on hand standing in favor of some of the legatees not named in the will provides shall be set off against the claims of the holders thereof, is improper. *Id.*,

9. An order of distribution which requires the executor to pay to the legatees, before bond is given by the legatees to receive the same, any debt which may afterward appear against the estate. *Id.*,

10. Such bond is necessary, even where the executor has satisfied all demands against the estate, as contained in Chap. 3, B. S. *Id.*,

11. A counter-claim, which is barred by the statute of limitations, may be pleaded against a claim which was made before the period of limitation expired. *Sherman v. Sherman*

ADMINISTRATION. *Continued.*

12. In such case evidence of services rendered by the claimant against which the statute has run are admissible to show satisfaction of the counter-claim. *Id.*, 482

13. A partnership debt is joint and several, and a creditor may either proceed against assets in the hands of a surviving partner, or against the estate of a deceased partner, and a failure to pursue partnership assets can not be relied upon as a defense, when suit is brought against the estate. *Mackay v. Pulford*, 593

14. Upon a claim filed by a widow and administratrix, against the estate of her deceased husband, to recover money paid out by her in his lifetime, in behalf of a partnership of which he was a member, this court declines to interfere with the verdict in her behalf. *Id.*, 593

AGENCY—See ESTOPPEL, 1, 2; GAMING, 5; PRACTICE, 8.

1. In an action on a due bill, it is held that the evidence was sufficient to warrant the findings that the person who issued it had authority as defendants' agent to do so, and that defendants afterward ratified its execution, and that there was no error in the giving or refusing of instructions. *McGillis v. Gale*, 317

APPEAL AND ERROR—See BILLS OF EXCEPTION; INSTRUCTIONS.

1. On appeal on the ground that the verdict is contrary to the evidence, the bill of exceptions must contain all the evidence. *City of Mt. Vernon v. Lee*, 24

2. Objections can not be raised for the first time in this court, which, if raised below, could have been obviated by proof or amendment. *Mooney v. Moriarty*, 175

3. Where, after part of the evidence has, by stipulation of the parties, been heard by the judge while sitting in another county, the cause is again called for hearing and determined in the proper county, objection that the cause was partly heard without the jurisdiction of the court can not be raised for the first time on appeal from the judgment. *Blain v. Manning*, 214

4. Objections for want of parties can not be made for the first time on appeal. *Harding v. Durand*, 238

5. Courts will not reverse for unimportant errors in the progress of a trial, or in instructions which have not misled the jury, and do not affect the merits of the case. *City of Elgin v. Joslyn*, 301

6. Unless all the instructions given for appellants are contained in the abstract, this court will presume that their refused instructions were properly refused. *McGillis v. Gale*, 316

7. Where the assignment of error is that the verdict was against the evidence and instructions, and no complaint is made of the giving or refusal of instructions, and the evidence was such as to warrant the verdict, the judgment will be affirmed. *Hazen v. Johnson*, 336

8. In an action for labor performed, this court declines to interfere with a verdict for plaintiffs. *Langdell v. Harney*, 406

9. Where a party has gone to trial without objection he can not complain on appeal that there was no joinder of error. *Greser v. People*, 415

APPEAL AND ERROR. *Continued.*

10. This court, upon examination of the record and abstracts, holds that the decree appealed from was in accordance with the remanding order of the Supreme Court, and there being no error in the record, affirms the decree. *Ryan v. Newcomb*, 538

11. The judgment of the Circuit Court being in conformity with the ruling of this court on a former appeal, and the proof being substantially the same, it is affirmed. *P. & P. N. Ry. Co. v. U. S. Rolling Stock Co.*, 552

12. Where no errors are assigned except such as require an examination of the evidence as preserved in the bill of exceptions, which has been stricken from the record, the judgment will be affirmed. *Douglas v. Suggs*, 554

13. A joint appeal will be dismissed unless all the appellants sign the bond. *Dingler v. Strawn*, 563

14. The court will reverse for failure of the appellee to file briefs. *Peoria County Fair Ass'n v. Union Brewing Co.*, 563

15. A verdict is final where the evidence was conflicting unless errors of law intervened of such gravity as will require a reversal. *L. E. & W. Ry. Co. v. Moran*, 632

ASSAULT AND BATTERY—See EVIDENCE, 4; JURISDICTION, 1.

ASSIGNMENT—See INSURANCE, 1.

1. In the case at bar it is held that a contract by a city to pay a company, "or its successors and assigns," for furnishing water to the city, was legally assigned. *City of Carlyle v. Carlyle Water, Light & Power Co.*, 28

2. The statutory provisions touching the mode of assigning negotiable instruments are not applicable to the assignment of such a contract. *Id.*, 28

ATTACHMENT.

1. The lien of an attachment is lost if the officer making the levy, or his agents, fail to retain the custody and possession of the property. *Hardin v. Sisson*, 383

2. A creditor can not bring attachment if no part of his claim is due. *Schilling v. Deane*, 513

3. A judgment creditor can interplead in an attachment suit and set aside a judgment entered therein on a debt not due. *Id.*, 513

4. A debt not due when an attachment suit is commenced thereon will be postponed to a junior attachment creditor whose debt is due. *Id.*, 513

ATTORNEY'S FEES—See INJUNCTIONS, 1, 2.

BILLS OF EXCEPTION—See APPEAL AND ERROR, 1.

1. The bill of exception must show that it contains all the evidence heard on the trial. *O. & M. Ry. Co. v. Cope*, 97

2. A judgment will not be reversed for insufficiency of the evidence, in the absence of a certificate in the bill of exceptions that it contains all the evidence. *Grimley v. Donahue*, 550

BILLS OF EXCEPTION. *Continued.*

3. A bill of exceptions which was presented to the judge, and signed by him, after expiration of the time allowed by order of the court, will, on motion, be stricken from the record. *Douglass v. Suggs*, 553

BONDS—See APPEAL AND ERROR, 13.

BREACH OF PROMISE OF MARRIAGE.

1. In an action for breach of contract of marriage, this court holds that a verdict for plaintiff was proper. *Lowden v. Morrison*, 495
2. Evidence of seduction in such action is admissible, though the seduction is not charged in the declaration. *Id.*, 495

CARRIERS—See RAILROADS, 42.

1. General authority given by a consignee to the consignor to deliver goods to a carrier for transportation includes the power to stipulate for the terms of transportation and accept a bill of lading containing exemptions from liability. *Brown v. L. & N. R. R. Co.*, 140

CERTIORARI—See HIGHWAYS, 1.

CONSTITUTIONAL LAW—See MUNICIPAL CORPORATIONS, 5, 6, 11, 12, 13.

CONTRACTS—See MUNICIPAL CORPORATIONS, 12, 16, 17, 18.

1. The date on the face of a contract is not even conclusive against the parties to it. *School District No. 4 v. Stilley*, 183
2. In an action for breach of contract it is competent under the general issue to show by parol evidence that the contract was delivered conditionally. *Curtis v. Harrison*, 287
3. In such action defendant may, after having gone to trial on a plea of the general issue, file a sworn plea denying delivery of the contract. *Id.*, 287
4. In an action for breach of a contract to purchase a monument, this court holds that the contract was incomplete on its face, and should not have been admitted in evidence. *Id.*, 287
5. In an action on a contract for sinking a well, in which plaintiff agreed that the well should furnish sufficient water to admit of steady pumping, and should be fitted complete with pump, which defendant claimed was not done, this court declines to interfere with a verdict for plaintiff. *Colburn v. Wescott*, 347
6. No one can keep the benefits of a contract and at the same time repudiate its obligations and burdens. *Pool v. Tucker*, 377

CORPORATIONS—See NEGOTIABLE INSTRUMENTS, 6.

1. Where the officers and stockholders of a corporation acquiesce in a sale and transfer by the president of all the assets of the corporation for a debt, they can not, in the absence of fraud, question the president's power to make it; nor does a subsequent judgment creditor of the corporation, with notice, occupy a better position. *Eagland v. McFall*, 135

CRIMINAL LAW—See DRAM SHOPS, 3.

1. An indictment for cutting trees on the land of another under Sec. 325 of the Criminal Code, which charges the offense in the language of the statute, is sufficiently specific without describing the land

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CRIMINAL LAW. *Continued.*

and containing the words "then and there."

2. On indictment for cutting trees on land which could only give consent to such cut at a meeting of its officers, evidence of the verities of the officers is inadmissible. *Id.*,

3. On indictment for an act prohibited by law, as to his motive in committing the act. *Id.*,

4. Sec. 1, Laws 1885, relating to cemeteries to cut trees therein, does not, by implication Criminal Code, in so far as it also provides a similar act. *Id.*,

DAMAGES—See HIGHWAYS, 6; RAILROADS, 17.

DIVORCE.

1. In a suit by the husband it is held, that he cannot obtain a decree of divorce on the ground of extreme cruelty. *Fritts v. Fritts*,

2. Refusal of the wife without justifiable cause to have sexual intercourse for a period exceeding two years, is sufficient to entitle the husband to a divorce. *Id.*,

3. In the case at bar it is held that the act of the wife in refusing him sexual intercourse is sufficient to entitle him to a divorce.

4. In a suit by the wife resulting in a decree of divorce for adultery, it is held that the wife was entitled to a three-year-old daughter; that a solicitor's fee for her maintenance was not excessive, and that she was properly maintained. *Johnson v. Johnson*,

5. While a decree of divorce, giving the custody of the infant child, and allowing her alimony, should be granted for herself and her child respectively, failure to do so is reversible error. *Id.*,

6. A decree of divorce rendered against a husband, which he was served with process but did not appear to, estops that property theretofore given plaintiff by the husband, estops defendant from afterward claiming it.

7. Such decree is competent evidence in a suit by the husband to recover the property mentioned in the decree.

8. The testimony of the wife is admissible in a suit by the husband. *Id.*,

9. Upon a bill filed for a divorce upon the ground of impotency of the wife, this court declines to grant a decree that complainant pay, by a day named, a certain sum to the solicitor. *Davis v. Davis*,

DRAM SHOPS.

1. In a suit by a city to recover the penalty for selling liquors, this court declines to interfere with the city. *City of Anna v. Leird*,

DRAM SHOPS. *Continued.*

2. Sec. 1, Chap. 43, Laws 1887 (Starr & Curtis, 237), prohibits the sale of intoxicating liquors outside of the incorporated limits of any city, town or village, except in original packages, and such packages must contain five gallons or more. *Jackson v. People*, 83

3. On an indictment for selling intoxicating liquors to a person in the habit of becoming intoxicated, this court declines to interfere with a finding of guilty by the court below. *Pergande v. People*, 169

4. One who is injured by an intoxicated person can not, under the Dram Shop Act, recover damages from the saloonkeeper who furnished such person with liquor, if the injured person invited him to drink or furnished him liquor which contributed to his intoxication. *Ilays v. Waite*, 397

ESTOPPEL—See DIVORCE, 6; FORMER ADJUDICATION, 2; SALES, 5.

1. Where a person contracts for the manufacture and purchase of machines, and his agent, who is the patentee of the machine and is familiar with the material and workmanship required, superintends their manufacture and accepts them, the buyer is estopped to deny that they were properly made. *Davidson v. Clark*, 313

2. If such agent recommends a workman as a proper person to work on the machine the manufacturers are not responsible for his want of skill. *Id.*, 313

EVIDENCE—See BREACH OF PROMISE OF MARRIAGE, 2; CONTRACTS, 1, 2, 4; CRIMINAL LAW, 2, 3; DIVORCE, 7, 8; HIGHWAYS, 10; INSTRUCTIONS, 1; NEGOTIABLE INSTRUMENTS, 7; PERSONAL INJURIES, 1, 2; RAILROADS, 19; SCHOOLS, 1.

1. The maker of an absolute note can not show, as against the payee, a parol agreement at the time the note was given, that it was to be paid conditionally. *May v. May*, 77

2. The death of a person can not affect the competency of a witness in a suit against his personal representative individually. *Estlerly Harvesting Co. v. Hill*, 99

3. Where there is a question whether money paid by the wife was her separate property or her husband's, it is competent to show that she had borrowed from a third person similar amounts on her own credit. *Ragland v. McFull*, 135

4. Though the complaint of assault and battery alleges its commission on a certain day, proof of its commission on other days is admissible. *Wegener v. People*, 164

5. A record may be proven by a statement thereof, sworn to as an examined copy. *Norton v. City of East St. Louis*, 171

6. In an action on a verbal contract, a memorandum made by one of the parties and read to the other, at the time the contract was made, is admissible as tending to show what the contract was, and also as part of the *res gestæ*. *Ewing v. Bailey*, 191

7. A person's religious belief or unbelief can not render him incompetent as a witness. *Id.*, 191

8. In replevin of goods sold, claimed to have been obtained through the purchasers' fraudulent misrepresentations as to their financial condi-

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EVIDENCE. *Continued.*

tion, it is error to allow plaintiffs, or their agent, to testify as to conversations between the agent and the defendants' absence, concerning their statement made to the plaintiff.

9. A private memorandum of the purchase made by a member of plaintiffs' firm when not shown to have been known to or authorized by the firm is not competent evidence. *Id.*

10. Nor is it competent to prove a prior fact from their part with which plaintiffs were not connected.

11. Evidence of the rating of a merchant by a partner not shown to have been authorized by him, is not competent.

12. A memorandum book is not competent evidence of the person who made the entries therein, without proof required by statute as to the character of the book of keeping it. *Sexton v. Brown*,

13. The mere fact that the other party says a thing amounts to an admission of their correctness. *Id.*

14. Where a contract contains general, technical, or particular trade, parol evidence from those who made it as to the meaning of the words is admissible. *Id.*

15. The opinion of a witness as to the defectiveness of evidence, in an action for personal injuries sustained by a person, is inadmissible. *Kolb v. Sandwich Enterprise Co.*

EXECUTIONS—See EXEMPTIONS.

1. It is the duty of the officer serving an execution to return a writ of the nature of the writ. *Morrissey v. Morrissey*.

2. An execution is not defective in not showing a judgment. *Mooney v. Moriarty*,

3. A judgment debtor who, under an execution, turns over property to the sheriff, who has levied thereon, is liable for the property and turn out real estate instead. *Larson v. Larson*.

EXEMPTIONS.

1. If an execution debtor writes his name in a schedule of his personal property required by law, the signature is sufficient. *Schuman v. Schuman*.

2. The fact that the name so written is in a schedule of the rest of the affidavit is sufficient to prove the schedule on inquiry as to whether the name is that of the debtor. *Id.*

3. Where the officer levying an execution, returns a schedule of his property, swears him to it, and can not afterward question its validity for want of a return thereto. *Cooper v. Payne*,

4. In an action on a replevin bond, given by a debtor, the hands of an officer under execution, it is held

EXEMPTIONS. Continued.

justified in finding that defendant's failure to present a schedule of his property within ten days after the executions were served, was due to misrepresentations of the officer, and did not deprive him of his right to claim his exemptions, and that there was no error in giving and refusing instructions. *Morrissey v. Feeley*, 556

FIXTURES.

1. Machinery placed in a factory by the owner of the land, and either actually or constructively attached to the building, which is operated by belt or gearing from the motive power of the plant, and is necessary for the prosecution of the business for which the factory was erected, are fixtures which pass with the realty. *Calumet Iron & Steel Co. v. Lathrop*, 249

2. A bar counter and shelf placed in a building by the tenant for the purpose of conducting a saloon, and attached to the realty so that they can be removed without injury to the premises, are trade fixtures and do not pass with the realty. *Berger v. Hoerner*, 360

3. What is a reasonable time within which trade fixtures should be removed is a question of fact for the jury under the instructions of the court. *Id.*, 360

FORMER ADJUDICATION.

1. A judgment for costs against the assignor of a contract to furnish a city with water, brought after the assignment, is no bar to a subsequent suit on the contract by the assignee. *City of Carlyle v. Carlyle Water, Light & Power Co.*, 28

2. A judgment for defendant in an action of trespass *quare clausum fregit*, brought against a city for removing soil from a street, in which issue is joined as to whether the street is a public highway or belongs to plaintiff, estops plaintiff from raising the same question in a subsequent prosecution against him for obstructing such street. *Rhoads v. City of Metropolis*, 123

3. Where several issues are submitted, and a general verdict rendered, the presumption is that all the issues were found in favor of the prevailing party. *Id.*, 123

4. This presumption may be rebutted by showing that on one or more of the issues no evidence was offered. *Id.*, 123

FRAUD—See EVIDENCE, 8, 10; SALES, 11.

FRAUDULENT CONVEYANCES.

1. A *bona fide* trustee's sale will not be set aside because the value of the property was much greater than the amount bid therefor. *Bowman v. Ash*, 115

2. A trustee's sale will not be affected by an inaccurate statement of the amount of the debt, contained in the notice of the sale, unless made for fraudulent purposes. *Id.*, 115

3. In a suit to set aside various conveyances as fraudulent, in view of the evidence it is held that certain of the conveyances were in good faith and for valuable considerations, while others were properly set aside. *Id.*, 115

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GAMING—See NEGOTIABLE INSTRUMENTS, 11.

1. In assumpsit for commissions and money defendant's account, in transactions on the C in buying and selling grain, this court holds the illegal. *Wheeler v. McDermid*,

2. A contract to buy and sell grain on f intention, not of actual delivery, but of making the difference between the agreed and the mar contract. *Id.*,

3. The burden of proving the legality of s who seeks to enforce it. *Id.*,

4. Where an indivisible demand is in part be had for any part of it. *Id.*,

5. An agent or broker who knowingly execu tion for his principal can not recover money adv it. *Id.*,

6. A stake-holder of money bet upon a g chance is regarded as the depository of the respe affected by the illegal nature of their contract the winner unless previously notified not to do s

7. While an infant may repudiate his acti in depositing money with a stake-holder, he may known and after instructing the winner to take from the stake-holder after the same has been p

GIFT.

1. A gift not expressed or acknowledged i deemed an advancement. *May v. May*,

2. One claiming personal property as a gift by sonably strict proof of the gift. *Id.*,

3. A naked promise to give, without some au is not a gift. *Id.*,

4. In this case it is held that the evidence mortis. *Reed v. Barnum*,

5. A gift of a fund to a trustee with direct thereon to a certain person, without limitation a trust, is, upon the donor's death, equivalent to of the principal. *Id.*,

HIGHWAYS.

1. *Certiorari* is the proper remedy to review commissioners of highways in establishing a r^{ence},

2. Before damages can be assessed for land t way, the survey of the proposed road must be fil 36, Chap. 121, R. S. *Id.*,

3. The certificate of the commissioners requ 121, R. S., to be presented to a justice of the from the granting of a petition to establish a pu so presented or the commissioners can not proce

HIGHWAYS. *Continued.*

4. Abandonment of a highway is not a question dependent upon the length of time of its *non user*; but is to be established like any other question of fact. *Brockhausen v. Boehland*, 224

5. The acquisition by the public of another road as a public highway, to take the place of one which has been obstructed, is an abandonment of the latter. *Id.*, 224

6. Where a person cognizant of the fact accepts damages for injury to his property by reason of the abandonment of a highway which has become obstructed, and the opening of a new one, such damages will be presumed to include all damages which may result to him therefrom. *Id.*, 224

7. The decision of the public authorities as to whether the substituted highway is more convenient for the public than the old one, is binding on the courts. *Id.*, 224

8. Where a bridge is erected by the public authorities on a public highway only for the purpose of travel, they may remove it upon abandonment of the road as a highway. *Id.*, 224

9. To establish a highway by dedication, acceptance is as essential as the offer. Nor will it be presumed from the offer, though beneficial, where it imposes a burden, and like the offer, acceptance must be proved by some certain unequivocal act satisfactorily showing the intention. *Willey v. People*, 609

10. The intention on the part of the owner may be manifested in writing, or by declaration, or by acts *in pais*. A survey and plat alone may suffice and there can be no doubt that the streets and alleys of an incorporated town or village, used and recognized as such by the public, are highways to be protected against obstruction in the same manner as other public roads. *Id.*, 609

11. The acceptance of an offer of dedication can be proved by a municipality only by its own act, or that of those authorized in such matters to represent it. *Id.*, 609

12. To establish a public duty to keep open and in repair a highway by dedication, to treat any and all obstructions of it, by any and all persons, as nuisances, acceptance must be shown by something more than travel alone. *Id.*, 609

13. The mere fact that a highway is traveled over by whoever has occasion, or sees fit to do so, is not sufficient evidence of acceptance. *Id.*, 609

14. Upon an information charging defendant with obstructing two streets and a public alley by erecting a fence, the contention being as to whether said streets had ever been dedicated to and accepted by the public, this court holds that there is no evidence of such acceptance as the law requires, and that the verdict against the defendant can not stand. *Id.*, 609

HOMESTEAD—See LIMITATIONS, 9.

1. Where one, during his tenure of public office, leaves his homestead, together with his family, intending to return thereto, and goes to reside at another place, where he afterward votes, he does not there-

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HOMESTEAD. *Continued.*

by lose his right of homestead. *Moline Plow*

2. The affidavit of the judgment debtor is dict the sheriff's return, that the commission the debtor's homestead were householders. *M*

3. The amount of the homestead depends the time it is set off. *Id.*,

4. A homestead which has been once set of the property in value, again be subject to as *Id.*,

5. On motion by plaintiff in error to set asi of land which was claimed as his homestead an ranty before the levy, it is held that he is bou to enjoin the sale, brought by his grantee and interest. *Id.*,

6. The oath administered to householders sioners by a master in chancery under a dec lien, to appraise and set off a homestead, ma notary public. *Dillman v. Will County Nat. E*

7. The fact that the summons to the commis in the proceedings before them and the mast the signatures, by the solicitor for the party w does not invalidate the assignment of homeste

HUSBAND AND WIFE—See DIVORCE; EVIDENCE INJUNCTIONS.

1. Where an injunction is an important par a given case, solicitor's fees are allowable upo part of the damages, where the services were therewith. Fees for services in and about a t independent of the injunction, should not be *Plumb*,

2. In the case presented, this court holds t were incurred in defeating the action; that injunction necessarily followed as incidental t only damage sustained by reason of the injuncti payment to defendant upon her execution; t pensated therefor, and that the portion of the d ages such fees, can not stand. *Id.*,

INSOLVENCY.

1. Where a claim against a bankrupt estate mined during the three months after public assignees, during which claims are required to not be barred for non-presentation. *Suppiger*

2. The County Court has full and exclusive j estates under deeds of assignment made in conf and before any other jurisdiction has attached, when courts of equity may interfere to promt *Wilson v. Aaron*,

INSOLVENCY. *Continued.*

3. Upon an order of the trial court affirming an order of the County Court, directing that certain property attached be returned to the assignee under a voluntary assignment, this court holds that the County Court had jurisdiction of the same, and that relief should have been claimed, and the validity of the assignment questioned in that court alone. *Id.*, 576

4. Property described in the inventory under a deed of assignment, left with the assignor, under an arrangement with the assignee that he shall be compensated for care of the same up to the time of sale, is within the jurisdiction of the County Court. *Id.*, 576

INSTRUCTIONS—See AGENCY, 1; APPEAL AND ERROR, 5, 6; RAILROADS, 11, 22; SALES, 10, 11.

1. In replevin, where the evidence of ownership is conflicting, an instruction that defendant's possession at and after the commencement of the action is *prima facie* evidence of his ownership, and that, being in possession, he is presumed to be the owner, is erroneous. *McElhanon v. McFerron*, 22

2. In the case at bar the refusal of instructions which ought to have been given, is held to be no ground for reversal. *Fritts v. Fritts*, 31

3. Where there is no evidence on which to base it, an instruction should be refused. *Wheeler v. McDermid*, 179

4. An instruction should be refused where there is no evidence to which it can apply. *C., B. & Q. R. R. Co. v. Merckes*, 195

5. An instruction that it is the master's duty "to furnish reasonably safe machinery," imposes a higher degree of care than the law requires. *Id.*, 195

6. An erroneous instruction given for the appellee is not reversible error, where an instruction to the same effect was given for the appellant. *Id.*, 195

7. An instruction which ignores material facts which were proven, is erroneous. *Id.*, 195

8. The jury alone are the judges of the credibility of a witness, and an instruction which usurps this function is error. *Henderson v. Miller*, 232

9. An instruction which invites the attention of the jury to matter not really in the case is improper. *Curtis v. Harrison*, 287

10. An instruction is erroneous if there is no evidence to which it can apply. *Aultman & Co. v. Wykle*, 293

11. Refusal to give an instruction for defendant is not error, where the same instruction has in substance been given for plaintiff. *Higgins v. Spring*, 310

12. In the case presented, it is held that the instructions were not erroneous in giving undue prominence to certain portions of the facts. *Davidson v. Clark*, 313

13. In such action an instruction that the unsupported testimony of plaintiff, with a positive contradiction from defendant, will not sustain a contract of marriage, usurps the functions of the jury, and is properly refused. *Lowden v. Morrison*, 495

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INSTRUCTIONS. *Continued.*

14. An instruction that the jury are to c before them is unnecessary, and its refusal is

15. Where there is no evidence on which t should be refused. *Morrissey v. Feeley*,

16. An instruction for plaintiff omitting was necessary that he should have exercise not be given in an action for the recovery of injuries alleged to have been occasioned by th *L. E. & W. Ry. Co. v. Morain*,

17. An instruction not based upon the facts

18. Likewise an instruction setting forth facts would bar a recovery. *Id.*,

19. In an action brought to recover from personal injuries alleged to have been occasi gence, this court holds that the erroneous givin tion in behalf of the plaintiff was cured by th several instructions asked by the defendant w the trial judge, and declines to interfere w plaintiff. *Id.*,

INSURANCE—See MORTGAGES, 9, 10, 11, 12, 13.

1. The assignee of an insurance policy assignment, and acquires no greater rights th *v. Hakes*,

INTERPLEADER—See ATTACHMENT, 3.

JUDGMENTS AND DECREES.

1. Where notes with power of attorney to in payment of a machine warranted to do goo ment before breach of the warranty, which aft ment should be set aside on motion support purchaser be allowed to plead. *Keist v. King*

2. A justice of the peace can not annul a j tion by him. *Carr v. Trainor*,

JURISDICTION—See INSOLVENCY, 2, 3.

1. A justice of the peace has jurisdiction lawfully assaulting, beating and striking a child and thereby injuring her in health and limb assault and battery. *Wegener v. People*,

2. In an action of debt upon an adminis claimed that he had failed to perform his duty condition thereof, in not obeying an order of c an administrator *de bonis non*, this court hold had jurisdiction of all the matters in respect averred in the case presented, and that the sus of defendant's demurrer to the declaration w *Lane*,

LANDLORD AND TENANT—See FIXTURES.

1. Where one, holding under a lease under seal, holds over and pays the stipulated rent after his term expires, his tenancy is not by virtue of the original lease, and a new parol lease may be made. *Goldsbrough v. Gable*, 363

2. Where one holds under a lease providing for monthly payments, an agreement to pay semi-monthly is sufficient consideration for a new lease for less rent. *Id.*, 363

3. Where a new lease is fully executed, while the lessee is in possession under a former lease, and money is paid in accordance with it, the lessor is estopped to avoid it. *Id.*, 363

4. Evidence in this case is held to establish the execution of a new lease. *Id.*, 363

LIBEL—See SLANDER, 1.

LICENSES—See MUNICIPAL CORPORATIONS, 21.

LIENS—See ATTACHMENT, 1; MECHANICS' LIENS; REAL PROPERTY, 1; SALES, 3.

LIMITATIONS—See ADMINISTRATION, 5, 11, 12; MORTGAGES, 4, 6.

1. The statute of limitations does not run against notes secured by a mortgage while the mortgagor resides out of the State. *Harding v. Durand*, 238

2. Recognition of the debt by the mortgagor, and promise to pay, will take it out of the bar of the statute though the time of limitation has expired. *Id.*, 238

3. Where the payee of a note, made and payable in this State, is at the time the note becomes due, and continues a resident of this State, and the maker has always been and continues a non-resident, coming into the State occasionally on business only, the statute of limitations of this State does not run against an action on the note. *Story v. Thompson*, 370

4. Section 18 and 20, Chap. 83, R. S., construed. *Id.*, 370

5. Payments on a note, or the execution of a mortgage as additional security, revive the note for the period provided in the statute of limitations in force at the time of such payments, and not at the time the note was made. *Drury v. Henderson*, 521

6. A letter from the maker containing a conditional promise to pay a note, without proof of acceptance of the condition by the payee, is not sufficient to stop the running of the statute of limitations. *Id.*, 521

7. The payee's indorsement on a note of the payment of interest, is not sufficient to stop the running of the statute. *Id.*, 521

8. It seems that an action on a foreign judgment recovered before a justice of the peace must be commenced within five years after its rendition. *Swan v. Burk*, 555

9. In an action brought to recover an amount alleged to be due for material furnished, this court holds, that the indebtedness in question consisted of a running, and not two separate accounts; that the jury were justified in finding a subsequent promise to pay amount claimed; that the amount of the verdict, less the *remittitur*, was sustained by

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LIMITATIONS. *Continued.*

the evidence, but that it was error to allow as against the debtor's homestead for the make the same a lien upon certain real estate finds said homestead was situate. *Bo*

10. In an action of trespass brought for obstructing a way, this court holds, that the prescription to the use thereof, and that the the controversy involving the same. *Keyse*

11. In such actions the running of the statute interrupted by the death of the original grant

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution justified a verdict of \$150 for plaintiff. *Maff*

2. A person must use reasonable care in abstaining from causing to be instituted a prosecution for obtaining money by false pretenses. *Id.*

MARRIAGE—See BREACH OF PROMISE OF MARRIAGE.
MASTER AND SERVANT—See ESTOPPEL, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.

1. One who, at the time she signs a contract with the directors of a school district to teach, has a contract with the superintendent, can recover on the contract, though she has not applied to the board, and the date of the certificate. *School District No. 4 v. Stilley,*

2. Where a school board discharges a teacher, she may recover the amount of her wages according to the contract, if it is shown that during the time she could have been employed, the burden of proving which is on the teacher.

3. In an action for wages under a contract for teaching, the teacher declines to interfere with the finding for the plaintiff. *Bailey,*

4. The master is not liable for an injury to a servant where the negligence of the servant or his fellow servant, or materially contributed to it. *C. Merckes,*

5. Where a servant enters into a hazardous employment, and of the master's negligence, and continues therein without objection from the master's promise to remove the hazard, he cannot recover therefrom. *Id.*

6. A servant who is familiar with defective premises, but makes no objection thereto from his master to remove the danger, can recover sustained by reason thereof. *Kolb v. Sandwick,*

7. In an action for labor under a contract for teaching, the plaintiff claimed was broken by plaintiff's leaving the school, that the evidence warranted a verdict for the plaintiff. *Gunden,*

MASTER AND SERVANT. *Continued.*

8. Any person under contract, or other legal obligation, to represent or act for another in a particular business, can not lawfully serve or acquire any private interest of his own in opposition to such business, during the continuance of the relations between them. *Chaddock College v. Bretherick*, 621

9. Whether the taking of private pupils by a professor of music in a college is in competition therewith, is a question of fact for the jury. *Id.*, 621

10. In an action brought to recover a balance due on account of salary, this court declines, in view of the evidence, to interfere with a verdict for the plaintiff. *Id.*, 621

11. In an action brought by a discharged school teacher to recover a balance claimed to be due as salary, it is improper, as a test of competency, to require him upon cross-examination to answer questions propounded, or to show that after his employment a remonstrance was circulated in his district, and signed by divers persons. *Doyle v. School Directors*, 653

12. Evidence going to show that the plaintiff had miscalculated the amount due him, is not admissible as bearing upon the question of competency. *Id.*, 653

13. The neglect or refusal of parents to send their children to a given school can not, of itself, affect the right of its teacher to compensation in accordance with the terms of his contract. *Id.*, 653

14. An instruction in such case imposing upon the plaintiff the burden of proving that he had tried and failed to get other employment, should not be given. *Id.*, 653

15. Where other employment is obtained and wages amounting to as much as could be recovered under the first contract are earned, nominal damages may be recovered, in case of a breach upon the employer's part. *Id.*, 653

MECHANIC'S LIENS.

1. If, after a contract for labor on a building belonging to the wife is made by her husband with one who is ignorant of the wife's interest, the wife knowing what is being done, does not disclose her interest or prevent the work, she will be estopped to set up her rights as a defense to a mechanic's lien. *Bruck v. Bouermaster*, 510

2. In this suit to foreclose a mechanic's lien it is held that the husband contracted for the work as his wife's agent. *Id.*, 510

MISTAKE.

1. In cases where it is sought to reform a written instrument upon the ground of a mutual mistake, it is necessary that the complainant should clearly and satisfactorily establish the fact alleged, and relief will not be granted where the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. The remedy will only be granted upon a certainty of error. *Warrick v. Smith*, 619

2. In proceedings of this character, where all the evidence in the

MISTAKE. *Continued.*

case being considered the court entertains a certain conviction that the bill is true, it will decree accordingly, though there may be conflict upon material points in the case. There must be a higher degree of certainty than is to be had from the mere preponderance of the evidence. *Id.*, 619

MISTAKE OF LAW.

1. Equity will not relieve on account of mistakes at law, where the facts are, or by the exercise of due diligence might have been known. *Carr v. Trainor*, 587
2. Ignorance of law will not excuse any person either for a breach or omission of duty. *Id.*, 587

MORTGAGES—See SALES, 4; TRUSTS, 1, 2; USURY, 1, 2, 3, 4, 5.

1. Where a vendee, with knowledge of a mortgage, and that it was intended to cover the land purchased, promises to pay it in consideration of the mortgagee's allowing him to purchase, he can not afterward refuse to pay it on the ground that it does not in fact, by its description, cover the land. *Kellums v. Hawkins*, 161

2. In a suit to cancel a mortgage and note thereby secured, held by defendant as assignee, which complainant alleges were paid by defendant out of money received by him in conducting complainant's business, this court sustains a decree for complainant. *Connelly v. Connelly*, 210

3. The assignee of past due notes secured by a mortgage on domestic animals, the possession of which remains in the mortgagor, takes the notes subject to the claim of an agister or person who keeps, feeds or pastures the animals, for his charges. *Blain v. Manning*, 214

4. The grantee of mortgaged premises, in the absence of his open declaration that he holds adversely to the mortgage, will be treated as holding subordinate to it, until it is barred by the statute of limitations. *Harding v. Durand*, 238

5. The grantee of mortgaged premises can not acquire a title superior to the mortgage, by allowing the land to be sold for taxes and bidding it in. *Id.*, 238

6. In a suit to foreclose mortgages, this court holds that complainant was the owner of the mortgages; that they were not barred by the statute of limitations; that an assignment claimed by defendant from one other than complainant was a nullity; and that defendant acquired no title in the land superior to the mortgage. *Id.*, 238

7. The evidence in this case held not to establish a parol agreement to release a mortgage. *Gould v. Elgin City Banking Co.*, 390

8. Where a claim is disallowed by the court a mortgage which was given as collateral security therefor falls with it. *Sanger v. Palmer*, 485

9. An agreement by a mortgagor to insure for the benefit of his mortgagee, gives the latter an equitable lien on the proceeds of all policies taken out by the mortgagor, to the extent of his debt, whether they are taken out for his benefit or not. *Wilson v. Hakes*, 539

10. When mortgaged property is covered by insurance and destroyed

MORTGAGES. *Continued.*

by fire, the insurance money represents the property under the mortgage and goes to the mortgagee, to the extent of his debt. *Id.*, 539

11. If an insurance company, after notice of the mortgagee's claim, pays the insurance to others, it does so at its peril. *Id.*, 539

12. The fact that the mortgagee knows that additional insurance is taken out for the benefit of others, and makes no objection, does not affect his rights, so long as others are not put in a worse position by his silence. *Id.*, 539

13. Where insurance policies for the mortgagee's benefit contain the *pro rata* clause, the taking out by the mortgagor of additional insurance for the benefit of others, is a breach of a provision in the mortgage that he will do nothing to change or encumber the lien. *Id.*, 539

MUNICIPAL CORPORATIONS.

1. In an action against a city for personal injuries sustained by reason of a defective culvert on its streets, this court declines to interfere with a verdict for plaintiff. *City of Mt. Vernon v. Lee*, 24

2. In an action against a city for personal injuries sustained by reason of a defective sidewalk, this court declines to interfere with a verdict for plaintiff. *City of Centralia v. Baker*, 46

3. A person not knowing of a defect in the sidewalk has a right to presume it is safe, and need not keep her eyes on the walk. *Id.*, 46

4. An "unsafe" sidewalk is not "in a reasonable condition of repair." *Id.*, 46

5. Where there is an agreement to furnish gas for street lights, payment to be made monthly as the gas is furnished, no present liability is created, and warrants drawn for gas, furnished after the tax levy against a fund appropriated for the purpose, are valid. *City of East St. Louis v. Flannigan*, 50

6. Warrants showing on their face that they are payable "only from the appropriation of the taxes * * * appropriated and levied for the street light fund," are a sufficient compliance with the statute requiring them to show upon their face that they are payable "solely from said taxes when collected, and not otherwise." *Id.*, 50

7. In an action against a city for a death from cerebro-spinal meningitis claimed to have been caused by a blow in the back, received in an accident on a defective street, this court sustains a verdict for plaintiff. *City of Mt. Carmel v. Howell*, 68

8. When a city has notice, either actual or constructive, of a defect in a sidewalk, it is its duty to see that it is made reasonably safe. *City of Murphysboro v. O'Riley*, 157

9. In an action against a city for personal injuries sustained by reason of a defective sidewalk, proof that the walk was dangerous or unsafe is sufficient to render the city liable, without proof of notice to the city before the injury, that the defect made the walk dangerous. *Id.*, 157

10. In this action, it is held that the evidence warranted the jury in finding that the defect in the sidewalk existed a sufficient time to charge the city with constructive notice. *Id.*, 157

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MUNICIPAL CORPORATIONS. *Continued.*

11. The salary of a health officer appointed within the inhibition of Sec. 12, Art. 9 prohibiting a city from becoming indebted beyond *Norton v. City of East St. Louis*,

12. A statement of a city's indebtedness, clerk, is competent original evidence of such

13. In an action for salary due from a city That the evidence shows that at the time the city was indebted beyond the constitution therefore, liable. *Id.*,

14. In an action against a city for labor under contract, this court declines to inter plaintiff. *City of Elgin v. Joslyn*,

15. Where a city with which a person has work within a certain time, takes the work his default, such person may quit the work *meruit*. *Id.*,

16. Where such contract provides that not allowed or paid for unless done on the written and further provides that the contractor's claim made in writing within a certain time, the put his orders in writing will be considered insist on the contractor's putting his claim in

17. In an action on such contract it is held apply only to minor and unimportant changes and likely to occur in carrying it out, and not departures from the plans. *Id.*,

18. The city can not wait until the extra insisting on the contractor's complying will must do so when the work is ordered. *Id.*,

19. Assumpsit will lie for property wronged to one's own use. *Id.*,

20. In an action brought for the recovery of damages for injury suffered by reason of the laying of its sewers, this court declines, in view of the verdict for the plaintiff. *City of Bloom*

21. In an action brought for the violation prohibiting the peddling of goods without that the ordinance in question was broad and the city in question was entitled to pass and the defendant can not stand. *Delisle v. City of*

NEGLIGENCE—See RAILROADS, 12, 15.

NEGOTIABLE INSTRUMENTS—See ASSIGNMENTS; MORTGAGES, 3; SALES, 16; USURY

1. The set-off of a note assigned conditional using it as a set-off, with an agreement to return not so used, will not be allowed. *Sprigg v*

NEGOTIABLE INSTRUMENTS. *Continued.*

2. Nor will a judgment recovered on the note so assigned be allowed as a set-off. *Id.*, 102

8. The interest of the assignor of such note does not affect his competency as a witness for defendant, where the assignee is dead and the suit in which the judgment is sought to be set off is by his administratrix. *Id.*, 102

4. In an action on a note, a plea of the general issue sworn to amounts also to a plea of *non est factum*, and a special plea in addition thereto, that the note was signed by defendants as officers of a corporation and not individually, being no more than the general issue, is demurrable. *Williams v. Miami Powder Co.*, 107

5. Under the sworn plea of the general issue, plaintiff fully makes out its case by proof of execution of the notes. *Id.*, 107

6. The fact that the note is signed by defendants as officers of a corporation, and the name of the corporation is attached, does not release defendants from individual liability, in the absence of evidence that they were officers, and that the note was intended as the note of the corporation only. *Id.*, 107

7. Proof of defendant's handwriting is admissible to show execution of the note. *Id.*, 107

8. An agreement between the maker and payee of a note after maturity, without the knowledge and consent of the surety, to extend the note for a certain time in consideration of the maker's keeping the money thereby secured for that time, and paying interest thereon at the rate specified in the note, releases the surety. *Reynolds v. Barnard*, 218

9. Under the statute of this State it is not necessary that an agreement to extend the time of payment of a promissory note be in writing. *Id.*, 218

10. Where, in an action on a note, the declaration alleges that plaintiff is the assignee thereof before maturity, for value, special pleas which set out facts which would constitute a valid defense to the note in the hands of the original payee, but do not aver that plaintiff had notice of the facts or purchased the note after maturity, or that he was not the *bona fide* holder thereof, are demurrable. *Ebersole v. First Nat. Bank of Morrison*, 267

11. In this case it is *held*, that the contract for the purchase of Bohemian oats, for which the note in suit was given, is not, *per se*, a gambling contract, and defendant's plea, not alleging that the contract was intended by the parties thereto as a bet or wager, is demurrable. *Id.*, 267

NEW TRIALS—See PRACTICE, 2; SALES, 11.

OATHS—See HOMESTEAD.

OFFICERS—See PRINCIPAL AND SURETY, 4, 5.

1. In *quo warranto* to determine the right to an office, an instruction that the wilful absence of relator and failure to perform the duties of his office would amount to a resignation, is properly refused if it con-

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OFFICERS. *Continued.*

tains no declaration as to the length of time of
v. People,

2. Where a member of the board of trustees absents himself from the meetings of the board to perform the duties of his office for a period of time, he is deemed to have resigned his office, and it may be so declared upon order of the remaining members of the board.

3. County treasurers are not entitled to compensation under Sec. 23, Chap. 53, R. S., for receiving money paid into the treasury in condemnation proceedings under the Domain Act (Sec. 14, Chap. 47, R. S.).
R. R. Co.,

PARENT AND CHILD—See WILLS.

1. In the case presented, it is held that the defendant, in finding the defendant guilty of inflicting unjust punishment on his adopted child. *Wegener v. State,*

PARTIES—See APPEAL AND ERROR, 4; PRACTICE.

1. In an action against the "Wabash Railroad Company," death, the evidence showing that the road received was owned by the "Wabash, St. Louis & Pacific Co.," and the train which caused the injury was a receiver, it is held that plaintiff can not recover.
v. McKittrick,

PARTNERSHIP—See ADMINISTRATION, 13.

1. A valid decree winding up a partnership and distributing partnership assets, is a bar to a suit by a partner to establish his claim to the patents as individual property.
Murphy,

2. A partner, who, without objection, continues to manage the partnership under a decree, allows property to be sold as partnership assets, and the money to be paid therefor, is bound by the decree that it was his individual property. *Id.,*

3. Where plaintiffs sue as copartners, the presumption will be presumed unless defendant interposes a plea of partnership. *Langdell v. Harney,*

4. The individual members of a partnership are not bound by the partnership sign, and give no notice of the partnership debts contracted in the partnership name.
Alexander,

5. Upon a bill filed for the dissolution of a partnership and division of property on hand, the court holds, in view of the evidence, which shows that the parties in question were partners, that there was no obligation on them for compensation to complainant for costs of the decree in his favor can not be interfered with.

PERSONAL INJURIES—See INSTRUCTIONS, 1; PRACTICE, 4, 5, 6; MUNICIPAL CORPORATION; RAILROADS.

1. In an action against a railroad company for damages caused by a collision with a passenger train, it is held that the plaintiff is entitled to recover damages for the loss of his property.

PERSONAL INJURIES. *Continued.*

statement by the plaintiff, in the presence of the conductor, soon after the injury, that he let her fall, is not admissible as part of the *res gestæ*. *C., B. & Q. R. R. Co. v. Johnson*. 564

2. In such action annuity tables are not admissible to show how long plaintiff is likely to live, to endure the pain resulting from the injury. *Id.*, 564

PLEADING—CONTRACTS, 3; JURISDICTION, 2; NEGOTIABLE INSTRUMENTS, 4, 5, 10, 11; PARTNERSHIP, 3; PRACTICE, 7.

1. In an action on a replevin bond, a plea of *nul tiel* record which answers the declaration in part only, is demurrable. *Larson v. Laird*, 412

2. The replication "*de injuria*," is not proper where the plea sets up some authority in law which is *prima facie* a legal defense. *Tinker v. City of Rockford*, 460

3. A replication which is argumentative and does not take issue with the allegations of the plea, but simply attempts to set up matter which should have been alleged in the declaration, is demurrable. *Id.*, 460

4. A declaration is sufficient in law, if it properly avers facts which, with the legal presumptions arising thereon, make a *prima facie* case. It is then incumbent on the defendant, by pleading, to traverse or avoid some material fact so averred, or some material presumption, which, until overcome, stands for a fact; and upon proof of the facts alone, to overcome, by evidence, the presumption arising, or the fact averred. *People v. Lane*, 649

5. It is enough, in an action upon the judgment of a Superior Court, to aver its judgment without setting forth the jurisdictional fact. *Id.*, 649

PRACTICE—See APPEAL AND ERROR, BILLS OF EXCEPTION, EXECUTIONS, INSTRUCTIONS, MISTAKE.

1. It is in the discretion of the court to permit evidence to be given in rebuttal which should have been offered in chief. *Schumann v. Pilcher*, 43

2. It is not necessary that the grounds for a motion for a new trial be set forth in writing. *May v. May*, 77

3. The requirement of the statute, that the officer placed in charge of the jury when they retire to make up their verdict must be sworn, can not be dispensed with even in misdemeanors except by agreement. *Jackson v. People*, 88

4. It is error to set aside a judgment by default against joint defendants as to one of them only, and, upon his pleading, and the issues being found against him, to enter a separate judgment for a different amount against him, leaving the judgment by default to stand against the other defendant. *Reynolds v. Barnard*, 218

5. Persons who, though not necessary or proper parties, are made plaintiffs in error without their knowledge or consent, will be dismissed from the suit at the costs of their co-plaintiff, and errors assigned on their behalf will be stricken out. *Harding v. Durand*, 238

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PRACTICE. *Continued.*

6. Plaintiff in error can not assign error; have no interest in the suit; nor can he be con- affect him. *Id.*,

7. A demurrer does not admit inferences; matters of law deduced therefrom by the *Nat. Bank of Morrison*,

8. Service of process on one as agent c fact its agent, but who mails it a copy of th car's return thereon, with notice that suit l such service as can give the court jurisd

9. Nor is the sufficiency of the service l plaintiff's attorney wrote to defendant inf

10. In the case at bar this court suggests vacation of a judgment obtained without *Id.*,

11. After a master has made his report though notified, persistently neglected to a the cause back, is properly denied. *Gould*

12. Nor has a party under such circumst defense before the court. *Id.*,

13. A master's report, to which no exc conclusive against the parties upon the f stated. *Id.*,

14. Refusal to continue a cause on accou is not error. *Id.*,

15. Whether there is "good and sufficie otherwise than in the order in which it is p vided in Sec. 17, Practice Act, is a questio *Kiest*,

16. Where a party is duly notified of the trial of a cause, and fails to appear or obje complain because the cause was tried out

17. Sec. 14. Chap. 77, R. S., providing t time and place of sales under judgment sheriff's sales under execution. *Id.*,

18. In chancery causes the court fixes *Id.*,

19. Interrogatories calling for a finding probative facts, and not upon the ultimate must be decided, should be refused. *L. E*

PRINCIPAL AND SURETY—See NEGOTIABL

1. Misrepresentations by the payee of a

PRINCIPAL AND SURETY. *Continued.*

ties, though they may release him, do not affect the liability of the other sureties. *Casson v. Rasback*, 40

2. The sureties on a bond conditioned for the payment by the principal of a certain amount for merchandise which may be furnished him, are not liable to a beneficiary who agrees with the principal for the payment of a larger amount. *Crego v. People*, 407

3. One who sells merchandise absolutely to a manufacturer who has given bond conditioned for the payment of such dividends as he may earn, can not hold the sureties liable. *Id.*, 407

4. The sureties on the official bond of a master in chancery are bound by his agreement to accept less than his legal fees. *Greser v. People*, 415

5. A decree fixing the fees of a master in chancery at less than the law allows can not be attacked by his sureties in an action on his official bond. *Id.*, 415

6. In such an action, the people being the real plaintiffs, defendants can not raise a question as to the uses for which the action was brought. *Id.*, 415

QUO WARRANTO—OFFICERS, 1.

RAILROADS—See CARRIERS; INSTRUCTIONS, 19; PERSONAL INJURIES.

1. In an action against a railroad company for a wrongful death, a special finding that deceased did not exercise any precaution to protect herself from danger, is not such a finding of fact as will justify the court in entering judgment for defendant. *Treffert v. O. & M. Ry. Co.*, 93

2. The amount of damages to be awarded in such an action must be left to the discretion of the jury. *Id.*, 93

3. A railroad company can not refuse to accept a defective ticket for passage, where the defect is due to the carelessness of its agents. *O. & M. Ry. Co. v. Cope*, 97

4. In an action against a railroad company for personal injuries received by a brakeman while uncoupling cars, by reason of defective roadbed and lack of a handhold on the car, it is held that plaintiff's negligence in attempting to uncouple the cars while in motion, knowing of the absence of the handhold, releases the company from liability. *O. & M. R. R. Co. v. Bass*, 126

5. In an action against a railroad company for loss of goods by fire while in transportation, it will be assumed that special rates were given in consideration of an exemption from the common law liability contained in the bill of lading issued in another State, unless want of consideration is proven. *Brown v. L. & N. R. R. Co.*, 140

6. The consignor, being, under the laws of New York, the agent of the consignee in shipping goods and receiving bills of lading therefor, the consignee who sues in this State is bound by an agreement in a through bill of lading issued to the consignor in New York, that none of the connecting lines over which the goods are to be transported shall be liable for their loss by fire while in transportation. *Id.*, 140

7. A clause in a bill of lading issued to a consignor in another State consigned to a person in St. Louis, that no carrier shall be liable from

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RAILROADS. *Continued.*

loss by fire from any cause, on land or water, liable for loss by fire while the goods are awaiting port, releases a carrier from liability for such awaiting transshipment to St. Louis in its de

8. In an action against a railroad company is held that the evidence showed negligence on the part of defendant. *C. B. & N. R. R.*

9. In such action plaintiff can not recover negligence other than such as is charged in his de

10. An agreement, in consideration of a that the company shall not be liable in case of for gross negligence, is binding on the passenger

11. Where, in an action against a railroad for injuries, the declaration alleges that plaintiff's train, an instruction that she can recover care in alighting, is error. *C., I. St. L. &*

12. In such action, evidence that plaintiff while it was in motion shows negligence of ordinary care in alighting under such circumstances to recover. *Id.*,

13. A plan of re-organization of a railroad mortgage is foreclosed, by which the bondholders shall be bought in trust for them, and new greater than the old issue, is not void, though the new issue is to be used for the purposes *man v. Bonfield*,

14. In such case the trustee who purchases long as he holds title thereto, deny the interests of holders for whom he purchased. *Id.*,

15. In an action against a railroad company is held that the questions of negligence are were for the jury. *J., A. & U. R. R. Co.*

16. It is also held that a verdict of \$14,000 excessive. *Id.*,

17. A deed of land to a railroad company, without right of the grantor to sue for damages to the land on reason of lawful constructions by the company, is not incident to the operation and maintenance *of Rockford*,

18. The failure of a railroad company to connect with a connecting line, or to notify the consignee of a connecting line for three hours after the arriving repeated inquiries therefor, constitutes negligence. *P. R. R. Co. v. Potter*,

19. In an action brought to recover damages for the death of hogs, arising from the alleged ne

RAILROADS. *Continued.*

to deliver the same within a reasonable time, this court holds that the answer to a telephone inquiry as to their arrival, of the railroad telegraph office, was admissible as showing, *prima facie*, that the same came from a servant of the company, and declines to interfere with judgment for plaintiff. *Id.*, 590

20. The negligence of fellow-servants is one of the hazards assumed by an employe in entering upon a given employment. *O. & M. Ry. Co. v. Robb*, 627

21. Two railroad engineers in the same grade of service, each running over the same track, are, by reason of their ordinary and usual duties, to be looked upon as fellow-servants. *Id.*, 627

22. In an action against a railroad company to recover for the alleged breach of a contract on its part to carry certain live stock to a point named within a reasonable time, this court holds that an instruction asked by defendant, claiming to define gross negligence, was properly refused, and that, in view of the evidence, the verdict for the plaintiff can not be disturbed. *Q. & St. L. Ry. Co. v. Adams*, 629

REAL PROPERTY.

1. In an action to enforce a lien on land for the purchase money, in which defendant claimed he had made a settlement with his vendor, this court declines to interfere with a finding that the vendor was mentally incapable of making a binding settlement. *Miller v. Best*, 74

2. A vendee, in an action for the purchase money, can not set up breach by the vendor of a contract to furnish him a deed from another person having an interest in the land, if by procuring the deed himself he has made it impossible for the vendor to do so. *Calkins v. Williams*, 500

RECEIVERS—See PARTIES, 1.

REMITTITUR—See LIMITATIONS, 9.

1. Appellant can not assign as error the court's action in permitting appellee to remit part of the verdict before entering judgment thereon. *City of Elgin v. Joslyn*, 301

REPLEVIN—See EVIDENCE, 8.

1. Destruction by fire, while withheld, of property wrongfully replevied, does not absolve plaintiff from liability under the replevin bond. *Suppiger v. Gruaz*, 60

2. In an action on a replevin bond given in replevin of property levied on under execution, plaintiff may recover the costs incurred by the judgment debtor in the action in which the judgment was recovered. *Larson v. Laird*, 402

SALES—See JUDGMENTS AND DECREES, 1; PRACTICE, 17, 18; PRINCIPAL AND SURETY, 2, 3.

1. In the case presented it is *held*: That a provision in a contract to furnish coal, that if the seller fails to furnish it the buyer may purchase elsewhere, is not a waiver of the seller's liability in damages for such failure. *Cons. Coal Co. v. Block & Hartmann Smelting Co.*, 38

SALES. *Continued.*

2. When goods are delivered without the seller's authority, and the buyer fails to give his notes in payment, which was a condition precedent to the sale, the seller may retake possession. *Harrison Machine Works v. Miller*, 86
3. The purchaser of property on which there is a verbal lien, without notice of the lien, is not affected thereby. *Esterly Harvesting Co. v. Hill*, 99
4. Though property is covered by a chattel mortgage, a surrender by the parties thereto by way of sale and delivery of possession to pay a subsisting debt, without actual or intended fraud, is valid. *Ragland v. McFall*, 135
5. One who purchases bridges by the pound, and at the time of each purchase receives a statement of the weights, can not, after putting them up without complaint, claim overcharge in weights, and prove the weights by measurement. *Henekin v. Indiana Bridge Co.*, 166
6. In an action for the price of goods sold, the sale of which defendant claimed to have been rescinded by mutual consent, this court declines to interfere with the verdict for defendant. *Chamberlain v. Bain*, 230
7. A buyer can not recover damages for failure to deliver goods sold him, the price of which increased after the purchase, unless it is shown that the sale was on time, or that he tendered payment, or was ready and willing to pay for them, when demand for their delivery was made. *Sexton v. Brown*, 281
8. One can not enforce a warranty imposing mutual and dependent obligations and covenants until he has shown compliance on his part. *Aultman & Co. v. Wykle*, 293
9. A provision in a contract of sale warranting a machine to do good work, which requires the purchaser to give notice of dissatisfaction within five days, and makes his failure to do so evidence of fulfillment of the warranty, is just and binding. *Id.*, 293
10. In case of such a provision it is error to instruct the jury that the purchaser had a right to test the machine for a "reasonable time." *Id.*, 293
11. In attachment for the price of goods sold, it is held, that the instructions given, while some of them might have been more guarded in expression, were not as a series erroneous; that defendant was not guilty of fraud in purchasing the goods from plaintiffs, or in his manner of disposing of them; and that newly discovered evidence insisted upon for a new trial was not sufficient. *Singer v. Lidcrnosky*, 343
12. A sale of personal property without delivery is effective against creditors of the seller, unless they take action to avoid it before the purchaser takes possession. *Hardin v. Sisson*, 383
13. The mere knowledge of the seller that the buyer intends an unlawful use of the goods sold will not avoid the contract of sale. *Frohlich, Gardt & Co. v. Alexander*, 428

SALES. *Continued.*

14. Delivery to a carrier of goods sold is delivery to the consignee, and the law of the place of sale and delivery governs the validity of the sale. *Id.*, 428

15. Where different sales are made, the illegality of one or more will not invalidate those which were legal. *Id.*, 428

16. Where several notes are given in settlement of an account embracing sales, one or more of which were illegal, the seller, in an action on one of the notes, may appropriate to the illegal sales such of the other notes as are sufficient to cover them. *Id.*, 428

17. In an action for breach of warranty in the sale of a chattel it is a question for the jury whether there was a warranty and a breach thereof. *Kankakee Stone & Lime Co. v. Ugrow*, 443

18. In such action where it is sought to establish a warranty by implication from the use of general expressions, an instruction that the jury must believe that it was intended to make such a warranty by the use of general words, is proper. *Id.*, 448

19. If the seller responds to verbal notice of breach of warranty, he thereby waives a provision in the warranty that the notice must be in writing, and must be also given his agent. *Keist v. Kingman & Co.* 489

SCHOOLS—See MASTER AND SERVANT, 1, 2, 11, 12, 13, 14.

1. A certificate of qualification from a county superintendent is *prima facie* evidence of capacity to teach, and though it may be overcome by proof of incompetency, it can not be impeached in an action brought by a teacher for salary due, nor will it be invalidated by the improper introduction of testimony going to show that for the certificate in question he was not in fact examined. *Doyle v. School Directors*, 653

2. There need be no second examination of a teacher, upon the granting of a renewal certificate, the original certificate issued to him upon examination having expired by statutory limitation. *Id.*, 653

SET-OFF—See NEGOTIABLE INSTRUMENTS, 1, 2.

SLANDER AND LIBEL.

1. In an action for slander in charging plaintiff with commission of a crime, it is for the court to say whether the communication is privileged. *Cristman v. Cristman*, 567

2. To entitle plaintiff to recover in such action, there must have been both malice and want of probable cause. *Id.*, 567

3. Malice is not necessarily inferable from want of probable cause. *Id.*, 567

4. Whether there was malice and want of probable cause are questions for the jury. *Id.*, 567

5. In this case it is held, that the communications were conditionally privileged, that there was probable cause, and that the words were spoken without malice. *Id.*, 567

TRUSTS—See FRAUDULENT CONVEYANCES, 1, 2, 3; RAILROADS, 14.

1. In a suit by an administratrix, to compel the payment of a mort-

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TRUSTS. *Continued.*

gage out of money received by defendant from a policy on her intestate's life, payable to it is alleged is held by defendant in trust to pay neither the heirs nor the insurance company. *Bonney v. Bonney*,

2. Where, in such suit, the mortgage which pay is less than the amount of the trust fund, complain that the amount of the mortgage is not paid nor that it was ordered to be paid to the administrator by her. *Id.*,

3. Where a trust is completed no consideration.

USURY.

1. In a foreclosure suit this court holds defendant is entitled to a finding of usury. *Matzenbaugh v. Matzenbaugh*.

2. A provision in a mortgage for payment of interest in case of foreclosure is not usurious. *Id.*,

3. The makers of a note secured by mortgage on the mortgaged premises, may plead usury in defense.

4. A usurious note is binding as to all except the mortgage securing it as to all its provisions, except in the note. *Id.*,

5. Where the agent who makes a usurious loan is held to notice of the usury.

WARRANTY—See SALES.

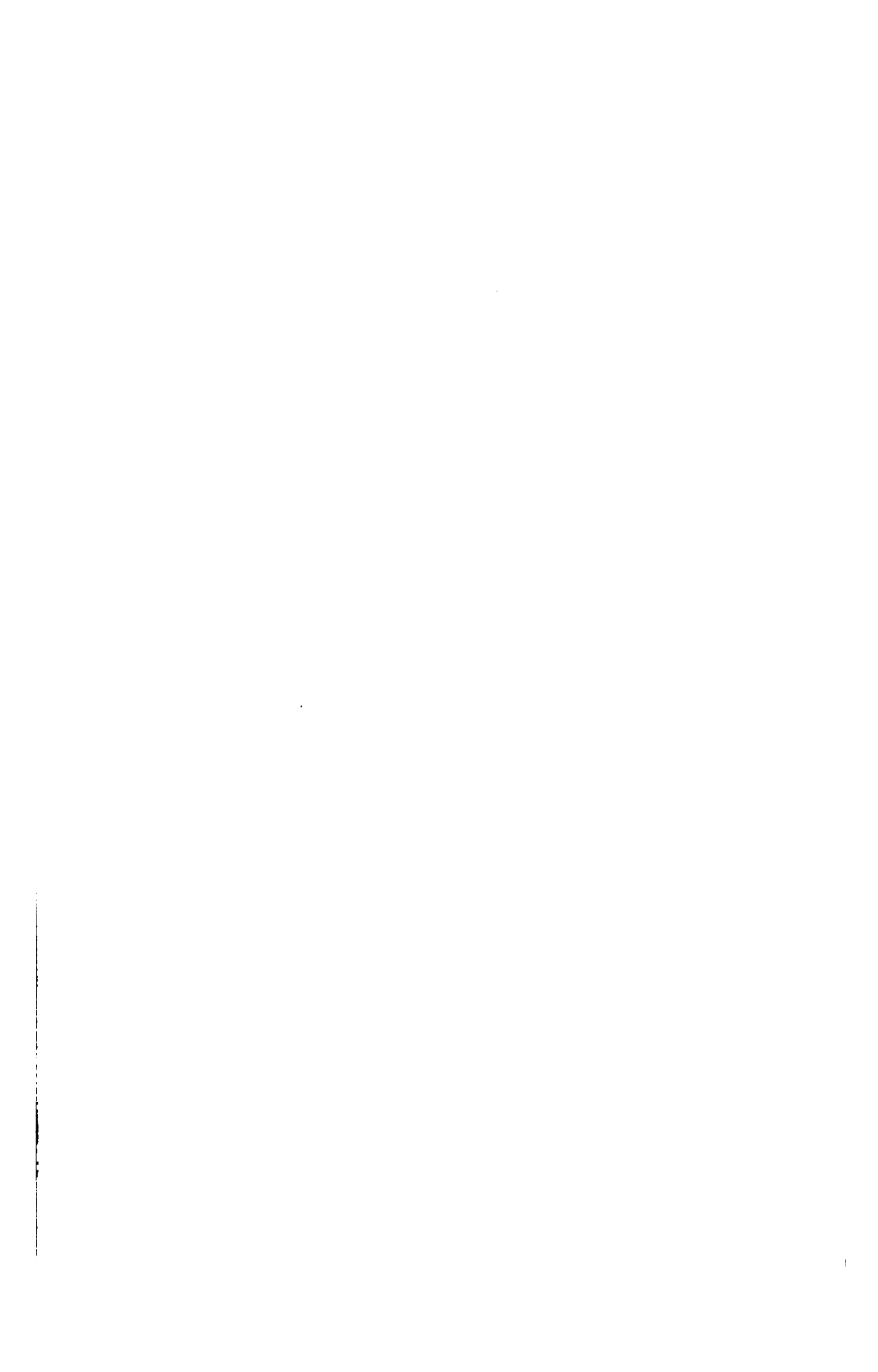
WILLS.

1. Children to whom a testator in one clause bequeaths property "to be in full of their portion of personal," take nothing under the residuary clause of his estate to be equally divided between "children." *Dickinson*,

2. Where a testator in specific bequests speaks of them each as "my son," or "my daughter," and of their mother as "my wife," they will share equally with the children in the residuary clause, which directs to be equally divided between "my children."

WITNESSES—See EVIDENCE, 2, 7; NEGOTIABLE INSTRUMENTS.

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